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In The

Supreme Court of the United States

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October Term, 1997

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Respondents.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Hondurans, individually,

Petitioners,

vs.

OMEGA AIR S DE RL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Government of Honduras entered into a relationship with private Bahamian and Honduran corporations. Those corporations brought suit in the United States on claims that the Government and its Director General of Civil Aeronautics (1) revoked the corporations' authority to perform airworthiness inspections and to issue airworthiness certificates; (2) failed to register and/or revoked the registration of aircraft presented to it by the corporations; and (3) notified the FAA of the aircraft recognized by the Honduran Government as registered under the Honduran Flag. The issue here is whether the Foreign Sovereign Immunities Act immunizes the Government of Honduras and its Director General from suit in the United States for claims based on these sovereign acts even though they are connected with an agreement that contains the delegation of authority to inspect and issue airworthiness certificates mixed with other elements that are commercial.

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The Government of Honduras and Guillermo Chirinos, Director General of Civil Aeronautics, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A, *infra*, 1a-16a) was issued on November 17, 1997, and is reported at 129 F.3d 543 (11th Cir. 1997). This superceded the initial opinion of the court (App. B, *infra*, 17a-32a) which was issued on August 25, 1997, and is reported at 119 F.3d 1530 (11th Cir. 1997). The Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (App. F, *infra*, 57a-58a) was issued on November 18, 1997.

The opinion of the district court with respect to Honduras Aircraft Registry, Ltd., and Honduras Air Registry Bureau, Limited (App. D, *infra*, 35a-45a) was issued on March 8, 1995, and is reported at 883 F. Supp. 685 (S.D. Fla 1995). The opinion of the district court with respect to Omega Air S De RL (App. E, *infra*, 46a-56a) was issued on June 15, 1995.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 33a-34a) was entered on August 25, 1997. After Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, the court of appeals entered its Denial of the Petition for Rehearing on November 18, 1997 (App. F, *infra*, 57a-58a). After Petitioners timely filed an Application For Extension of Time to File Petition for Certiorari, Associate Justice Anthony M. Kennedy signed an order extending the time for filing this petition to and including April 3, 199[illegible] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and pursuant to Rules 10(a) and 10(c) of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), originally enacted in Pub. L. No. 94-583, 90 Stat. 2891 and codified at 28 U.S.C.A. §§ 1330, 1602-11 (West 1994 & Supp 1997) is involved in this petition and are contained in Appendix G, *infra*, 59a-60a).

STATEMENT OF THE CASE

Respondents purport to have invoked the subject matter jurisdiction of the district court under 28 U.S.C. § 1330(a) and 28 U.S.C. § 1605(a)(2), claiming the "commercial activity exception" to the sovereign immunity of foreign states as codified in 28 U.S.C. §§ 1603-04. Petitioners contested subject matter jurisdiction of the court from the onset claiming, among other things, that Respondents' claims are not based on a commercial act or activity with a direct effect in the United States.

A. Factual Background

1. Overview

This case arises out of a formal relationship entered into between The Direccion General de Aeronautica Civil ("DGAC"), a Honduran agency that is the equivalent of the United States Federal Aviation Administration ("FAA") and a Bahamian corporation and its Honduran subsidiary corporation.[1]

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1. The facts as stated in this petition are taken largely from the Eleventh Circuit's decision, from the allegations in Respondents' Amended Complaints which are assumed true on appeal from a motion to dismiss and from affidavits produced by the parties to the district court. Petitioners deny most of Respondents' allegations.

Respondent, Honduras Aircraft Registry, Ltd. ("HAR-Honduras"), is a Honduran subsidiary corporation, fifty-one percent of which is purportedly owned by Hondurans. Respondent, Honduras Aircraft Registry Bureau, Ltd. ("HAR-Bahamas"), a Bahamian parent corporation, owns the remainder. The subsidiary company was incorporated in Honduras in May 1992. These two closely-related corporations (referred to collectively as "HAR") were established to negotiate an agreement with the Honduran Government to perform airworthiness inspections and to issue airworthiness certificates (App. A, *infra*, 3a).

HAR's petition resulted in an agreement on June 4, 1992, entitled "Convention of Technical Assistance Between the Directorate General of Civil Aeronautics and Honduras Aircraft Registry, Ltd." This agreement was modified by the parties in a separate agreement on December 16, 1993. *Id.* HAR claims that these two agreements gave them the right to inspect commercial aircraft, issue airworthiness certificates, and required the Government of Honduras to register their inspected aircraft.

Respondent, Omega Air S de RL ("Omega Air"), is a Honduran subsidiary company of an Irish air carrier. Omega Air is purportedly majority owned by Hondurans and minority owned by an Irish air carrier by the same name. Omega Air obtained inspections and Honduran registrations of several aircraft from HAR. The remaining Petitioner, Guillermo Chirinos, was Director General of Civil Aeronautics of the Republic of Honduras, the government official who was charged with the duty to notify the FAA of the aircraft which were actually registered under the Honduran Flag (App. A, *infra*, 6a).

a. HAR-Bahamas' Petition to the Honduran Government

In October 1991, HAR-Bahamas, a Bahamian corporation, filed a petition with the Government of Honduras entitled:

PETITION FOR AUTHORIZATION FROM THE GOVERNMENT OF HONDURAS TO ISSUE TECHNICAL CERTIFICATES TO CIVILIAN AIRCRAFT WHICH ARE REGISTERED UNDER THE HONDURAN FLAG ACCORDING TO OUR LAWS AND . . . THE INTERNATIONAL CIVIL AVIATION CONVENTION

This petition sought governmental authorization to inspect and to allow issuance of airworthiness certificates to aircraft that were registered under the Honduran Flag (R1-23-1-2, AH. 1, Ex. A).

In the body of HAR's petition, HAR requests the Honduran Government to "officially authorize [HAR] so that in the name of the Government of Honduras, it can operate as an authorized Company" to inspect aircraft for the purpose of issuing airworthiness certificates (R3-61-Ex. A-2-3).[2] An aircraft inspection is a necessary prerequisite for the issuance of airworthiness certificates by the Honduran Government (R1-23-1-2, Att. 1, Ex. A).

Pursuant to the multilateral treaty commonly known as the "Chicago Convention," *see* Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, 3 Bevans 944, civil aircraft registered under the flag of a Contracting State must have a Certificate of Airworthiness from that State. Aircraft that are registered under the flag of a Contracting State and that have a Certificate of Airworthiness from that State may under certain conditions operate over and

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2. Record references refer to the record before the court of appeals. The cite refers to the type of record, volume number, document number, and page number.

through the airspace of the other Contracting States without having to obtain a Certificate of Airworthiness from those states.[3]

b. Accord 000818 and the Implementing Agreements — Authorization of HAR to Perform Airworthiness Inspections of Honduran Registered Aircraft

In response to HAR's petition, President Callejas issued Accord 000818, which officially:

> authorize[d] [HAR], so that in name of the Government of Honduras and under the supervision of the Ministry of Communication, Public Works and Transportation . . . [HAR] can carry out the corresponding inspections of the aircraft which in compliance with Honduran laws are registered under Honduran Flag, being able to issue the Technical Certificates stipulated by our laws and by the different Conventions on which Honduras is a part.

(R3-61-Ex. A-18). The Accord spells out the nature of the power it intends to delegate to HAR: the Government, through the "Executive Power" of Honduras, and pursuant to the authority recognized by international treaties and domestic law, delegated a Government function to HAR: airworthiness inspections of Honduran aircraft for the purpose of issuing airworthiness certificates (R3-61-Ex. A-21).

Like any official authorization to perform a government function, the Accord makes clear that, along with the privilege

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3. The Government of Honduras, the United States and most other countries of the world are Contracting States to the Chicago Convention. This Convention and its system of registration and of certification of aircraft, pilots and technical personnel are the crucial underpinning of the world's air transportation system.

of performing the Government function of inspecting aircraft and issuing airworthiness certificates, comes the concomitant duty to meet the minimal requirements for the exercise of that Government function. The particular requirements and conditions relating to the exercise of HAR's Government function were left to be specified in a subsequent agreement. Also, as is common when authorizing the performance of a government function, the Honduran Government reserved the right to suspend or revoke HAR's authorization if, at any time, the Government discovered that HAR was not fulfilling the minimal requirements for exercise of the Government function (R3-61-Ex. A-22).

Subsequent to the Accord, HAR and the DGAC entered into a June 4, 1992 agreement entitled a Convenio de Asistencia Tecnicas (R1-23, Att. 1 at 3). Then, on December 16, 1993, HAR and the DGAC entered into another agreement which modified the original agreement (collectively the "Agreement"). The Agreement listed the minimum requirements that HAR had to meet to qualify to perform its Government function: setting up a registry database, providing technical services and promoting the Honduran Registry, all of which were ancillary to HAR's primary duty under the Agreement: to perform airworthiness inspections for issuance of airworthiness certificates (R1-1-Ex. C).

On its face, unlike a simple contract for the sale of goods and services, the Agreement does not expressly obligate the Government of Honduras to do anything in the future. Instead, it delegates to HAR a government function. In fact, it even designates, Wayne Hilmer (the manager of HAR), as a Government Representative "ad-honorem". His title: "International Director of Regulation of Air Navigation," responsible for airworthiness and air operations. As a Government Representative, he was expected to communicate

and cooperate with the FAA and other countries' aviation authorities in the name of the Government (R1-1-Ex. C-2).

c. Accord 001168 — Termination of HAR'S Authority to Perform Airworthiness Inspections of Honduran Registered Aircraft

On or about January 27, 1994, Dr. Carlos Roberto Reina was inaugurated as the new President of Honduras. Shortly after his administration assumed office, the Government discovered that HAR was issuing registrations to foreign (non-Honduran) juridical entities, inspecting aircraft that were *not* registered under the Honduran Flag and issuing licenses to foreign pilots (R1-1 at 6-7, ¶ 21; R1-23, Att. 1 at 4-5 & Att. 1, Ex. D). All of these activities were prohibited by the terms of Accord 000818, the Agreement and Honduran law. Thus, on July 26, 1994, President Reina issued Accord No. 001168, canceling Accord No. 000818 and the Agreement (R1-23, Att. 1 at 4-5). Pursuant to Accord No. 001168, the Government of Honduras notified the FAA and the International Civil Aviation Organization ("ICAO") of its cancellation of Accord No. 000818, and of all aircraft properly registered under the Honduran Flag.

2. *HAR And Omega Air's Allegations*[4]

HAR's complaint contains three counts: (1) breach of contract; (2) unjust enrichment; and (3) tortious interference.

In Count I, HAR alleges that the Government breached the contract by failing to register "aircraft inspected by [HAR]"

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4. Because the issue of jurisdiction under the FSIA was raised in a motion to dismiss, the district court assumed that all of the allegations in the complaint were true, even where disputed by affidavits filed by Petitioners.

and by "inform[ing] third parties that aircraft registered by [HAR] have no certification to fly when this is not true." R1-1-8, 9. *See also* R2-31-2, 7 (Honduras authorized HAR to issue Certificates of Airworthiness).

In Count II (Unjust Enrichment), HAR repeats and realleges the allegations above, and adds that it would be "inequitable" for Honduras to "enjoy the fruits of the bargain" in light of HAR's "reliance on the representations made by HONDURAS," *i.e.*, Honduras' delegation of authority to issue airworthiness certificates and Honduras' alleged promise to register HAR-inspected aircraft in the Honduran Registry (R1-1-10).

Count III (Tortious Interference with Business Relationship) alleges that Chirinos, the Director General of Civil Aeronautics, tortiously interfered with a business relationship because he

> intentionally sent [a] communication . . . [to the FAA] stating that the commercial and civil aircraft lawfully registered by HONDURAS through the efforts of [HAR] are not properly registered [in the Honduran Registry] and that the contract with [HAR] is not lawful.

(R1-1-11). In other words, HAR contends that the Government of Honduras is liable for tortious interference based on a nation-to-nation (Honduras to United States) communication regarding its national Registry of Aircraft.

Similarly, all of the Counts in Omega Air's Complaint in Intervention focus on either the Government of Honduras' failure to register aircraft under its Flag, or its official contact with the United States Government (R1-35).

Thus, according to Respondents, the Government of Honduras breached the Agreement with HAR (1) by failing to

register HAR-inspected aircraft under the Honduran Flag; (2) by revoking HAR's governmental authority to issue Certificates of Airworthiness; and (3) by notifying the FAA of the United States, per the Chicago Convention, of all properly registered aircraft under the Honduran Flag.

B. Procedural Background

On September 9, 1994, HAR filed their Complaint against the Government of Honduras and Guillermo Chirinos, individually (sometimes collectively referred to as the "Government") (R1-1). The Government filed a motion to dismiss based on lack of subject-matter jurisdiction/qualified immunity under the FSIA, lack of personal jurisdiction, the act of state doctrine and the doctrine of *forum non conveniens* (R1-21).[5] HAR responded to the motion to dismiss with counter affidavits, but before the Government could reply, the court entered an Order denying the motion to dismiss (App., *infra*, 26a-36a).

In its order, the district court did not address the sovereign aspects of the case such as registration and certification of aircraft, did not address the basis of HAR's claims and the connected activity and instead focused on the incidental aspects of the relationship between Honduras and HAR that were of a commercial character.

A month after HAR filed their Complaint, Respondent Omega Air filed its Motion to Intervene and Complaint in Intervention (1SR-12). Over the Government's objection, the court granted Omega Air's motion (1SR-24). Omega Air then filed an Amended Complaint (R1-35) to which the Government

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5. The court chose not to conduct an evidentiary hearing on any of the issues disputed by the affidavits attached to the Government's motion to dismiss.

filed a motion to dismiss (1SR-56). Omega Air responded and, again before the Government could file their reply, the court denied the motion (App., *infra*, 37a-47a). In this latter Order, the district court relied on its analysis from the prior Order to reach the same result.

On April 12, 1995, and July 19, 1995, the Government timely appealed both Orders to the Court of Appeals for the Eleventh Circuit (R2-53; SR1-68). These appeals were later consolidated by the Court of Appeals. After briefing and oral argument, the Court of Appeals issued its August 25, 1997, decision (App., *infra*, 1a-10a) affirming the District Court on its denial of foreign sovereign immunity, reversing the District Court for grafting the FSIA's commercial activity exception onto the Act of State Doctrine and declining to accept supplemental jurisdiction over the *forum non conveniens* issue. The court of appeals remanded the case to the district court for further determination of the applicability of the Act of State Doctrine (App. A, *infra*, 15a) and by separate order issued its judgment with respect to HAR and Omega Air (App. C, *infra*, 33a-34a).

The Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Rehearing was denied on November 18, 1997 (App. F, *infra*, 57a-58a), one day after the court issued an amended opinion correcting factual and legal errors in the opinion (App. A, *infra*, 1a-16a).

REASONS FOR GRANTING THE WRIT

I.

THE NATION'S COURTS AND FOREIGN COUNTRIES NEED THIS COURT'S GUIDANCE AND AUTHORITATIVE VOICE ON THE IMPORTANT UNDECIDED ISSUE OF WHEN A FOREIGN SOVEREIGN IS IMMUNE FROM SUIT IN THE UNITED STATES WHERE THE ACTS SUED UPON ARE SOVEREIGN BUT ARE CONNECTED TO A CONTRACT WITH BOTH SOVEREIGN AND COMMERCIAL ELEMENTS.

Sovereign immunity as a doctrine of international law was first recognized in the United States in the *Schooner Exchange v. M. Fadden*, 7 Cranch 116 (1812). *See* H. Rep. No. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. For most of the early evolution of foreign sovereign immunity law in this country, the law was that of "absolute immunity" for the foreign sovereign.

In the past 200 years, courts have evolved from "absolute" recognition of immunity of a foreign sovereign for all of its acts to a "restricted" recognition of immunity for only its governmental acts. Beginning particularly with the "Tate Letter" in 1952 and continuing until 1976 with the enactment of the FSIA, the United States Department of State ("DOS") evaluated foreign countries' diplomatic requests for immunity and, if it is determined the action involved governmental activity, it directed the United States Department of Justice ("DOJ") to file a suggestion of immunity. To those countries whose action involved commercial activity, DOS would send its regrets. H. Rep. No. 94-1487, at 8-9, 1976 U.S.C.C.A.N. at 6606-07. The federal courts abided by DOJ's suggestions.

With the enactment of the FSIA, Congress vested the courts with the determination of sovereign immunity. 28 U.S.C. § 1602; H. Rep. No. 94-1487, at 12-13, U.S.C.C.A.N. at 6611. Congress sought to create uniformity of jurisdiction and corresponding sovereign immunity because of the recognized importance of avoiding disparate treatment of foreign governments:

> Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.

H. Rep. No. 94-1487, at 12-13, 1976 U.S.C.C.A.N. at 6611. This concern for uniformity and to avoid disparate treatment has been recognized by this Court. *E.g.*, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

As ultimately codified in the FSIA in 1976, a foreign sovereign is immune from suit in federal and state courts unless one of several specified exceptions apply. 28 U.S.C. § 1604; H. Rep. No. 94-1487, at 17-18, 1976 U.S.C.C.A.N. at 6616. The most important of these exceptions is the commercial activity exception contained in 28 U.S.C. § 1605(a)(2). This exception provides jurisdiction and negates immunity in any case "in which the action is based":

> [Clause 1] upon a commercial activity carried on in the United States by the foreign state; or
>
> [Clause 2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or

> [Clause 3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

Id. (formatting added). At first, the distinction between governmental versus commercial activity may seem as clear as the distinction between black and white. However, between black and white, there are many combinations of black and white and shades of gray. And so it is with the distinction between sovereign and commercial.

Recognizing that the critical term "commercial" is largely undefined, Congress charged the courts with filling in the definition based on actual cases as they arise. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308-09 (2d Cir. 1981) (referring to the FSIA as a "marvel of compression" and a "Gordian knot." *Id.* at 306-07); H. Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. at 6615 ("The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill.").

All of this prompted this Court to proclaim recently that the definition of "commercial activity" in 28 U.S.C. § 1603(d) is "one distinguished only by its diffidence" and that the courts must respond to fill in the gap:

> The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act.

Saudi Arabia v. Nelson, 507 U.S. 349, 359 (1993).

District courts and courts of appeals struggled to define the term "commercial" for 16 years until this Court finally accepted

certiorari to hear *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). There, the Court addressed a breach of contract action against the Country of Argentina for changing the due date of government bonds that it had sold in the New York bond market. Under a clause three analysis, the Court concluded that Argentina acted in connection with activity that was *only* commercial. *Id.* at 614-17.

Disregarding the governmental purpose for Argentina issuing the bonds, as it should under the FSIA, the Court found that the case involved breach of garden-variety debt instruments which could be held by private parties. *Id.* at 615. In fact, the Court found nothing about Argentina's assumption or issuance of the debt instruments (except their purpose) that was not analogous to a private commercial transaction. *Id.* at 615-16.

Two tests were enunciated by the Court in *Weltover*, both of which are easily applied only in garden-variety, homogeneous cases:

1. [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA.

2. [B]ecause the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," . . . the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce. . . ."

Weltover, 504 U.S. at 614 [citations omitted].

In its most recent case on the difference between sovereign and commercial activity, the Court found that *only* purely

sovereign activity was involved. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). In *Nelson*, the Court addressed tort actions by an employee of a hospital which was an instrumentality of Saudi Arabia. The hospital hired Nelson in the United States to work for the hospital in Saudi Arabia and it was in Saudi Arabia where he was allegedly assaulted by police for his whistle-blowing activities.

In this clause one case, the Court focused on the relevant activity which the claim was based upon, *i.e.*, "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case" and in doing so, the "focus should be on the 'gravamen of the complaint'." *Id.* at 357 (citations omitted). When the Court applied the test to these facts, it found that Nelson's tort claims were based on the Saudi Government's wrongful arrest, imprisonment, and torture. Reducing these acts to their essence, the Court found

> [t]he conduct boils down to abuse of power of its police by the Saudi Government, and . . . a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

Id. at 361 (citations omitted).

Under *Nelson*, the methodology is to focus on the acts and the activity at issue in the case and, at least as in *Nelson* where these acts and activity were homogeneous, boil them down to their essence and apply the *Weltover* tests. The Court did not change the definitions of commercial activity formulated in *Weltover* but instead defined the focus of the test, at least for a clause one case under 28 U.S.C. § 1605(a)(2).

Nelson did not allege in his complaint that the sovereign but tortious acts were a breach of contract. For that reason, this

Court expressly held: "[W]e do not address the case where a claim consists of both commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4. Nelson also did not allege in his complaint that the sovereign but tortious acts were connected with the arguably commercial activity of his hiring by Saudi Arabia in the United States, *i.e.*, a clause three case under 28 U.S.C. § 1605(a)(2). However, the Court did say in dicta:

> We do conclude, however, that where a claim rests entirely upon activities sovereign in character, as here, . . . jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity.

Id. Thus, the issue that the Court has expressly left open is immunity to a claim on a sovereign act connected to a contract that contains both sovereign and commercial elements.

At least three different tests or methods of analysis have been developed by various courts confronted with mixed activities or mixed elements of a contract. The first is an "overall analysis" test, a relatively undisciplined approach that looks at all the aspects of the relationship between the government and the private party, eliminates those factors that relate to purpose and decides whether the remaining activities as a whole are sovereign or commercial. This test led the Eleventh Circuit in this case and the Ninth Circuit to a direct conflict on the same facts. The second test is the "central prescription" test which focuses on the primary as opposed to ancillary aspects of the relationship. The third test is the "activity in question" test which focuses on the activities that constitute the gravamen of the complaint whether or not they are a primary or ancillary aspect of the relationship.

These tests are discussed in the following section.

II.

THE CIRCUITS ARE IN CONFLICT AMONG THEMSELVES IN FOREIGN SOVEREIGN IMMUNITY CASES THAT INVOLVE BOTH SOVEREIGN AND COMMERCIAL ELEMENTS.

A. The Eleventh Circuit Decision And The Decision Of The Ninth Circuit In *MOL, Inc. v. Bangladesh* Are In Direct Conflict On The Same Facts.

The facts of *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984), and this case — both the nature of the activity sued on and the connected activity — are identical. Both the Ninth Circuit and the Eleventh Circuit first found that the agreements at issue contained both sovereign and commercial elements. Both courts then performed an overall analysis of the activity between the parties and because this test does not lead to predictable results in a mixed case, the courts reached the opposite result on the very same facts.

In *MOL*, Bangladesh granted MOL, Inc., an Oregon corporation, a ten-year license to capture and export rhesus monkeys to be used exclusively for the purposes of medical research. Similar to the agreements between HAR and Honduras, Bangladesh placed requirements on MOL's privilege to perform this government function. MOL was required pursuant to the agreement to build a breeding farm for rhesus monkeys. Further, to enable Bangladesh to monitor the uses of the monkeys, MOL was also required to maintain records for each monkey. *Id.* at 1327. And, just as was the case in the HAR agreements, the agreement with MOL, Inc., reserved the government's right to terminate the agreement at any time if MOL failed to fulfill its obligations required under the agreement. *Id.*

Some two years after entering into the contract, Bangladesh terminated the agreement because it discovered that MOL had not satisfied the agreement's minimal requirements. Instead of pursuing administrative remedies and/or suing the government in Bangladesh, MOL sued the government for breach of contract in the United States. *Id.* at 1327-28. The district court dismissed the action for lack of subject matter jurisdiction. On appeal, the Ninth Circuit addressed whether the district court had subject matter jurisdiction under FSIA's commercial activity exception.

Just as HAR is forced to concede that regulation of aircraft registration and airworthiness are governmental activities, MOL, Inc., admitted that the exploitation of natural resources and export of goods are government activities. *Id.* at 1328. But MOL, Inc., as HAR did here, argued that Bangladesh's acts lost their sovereign status when the State entered into a "normal contract" for the exchange of goods and services, and when it then terminated the agreement pursuant to the "contract's terms." *Id.* at 1329.

At first blush, this argument seems persuasive because the parties did enter into a "contract" which arguably included commercial terms and MOL alleged a "breach of the contract." The Ninth Circuit acknowledged that while one could certainly characterize the agreement as a mere contract for the sale of monkeys, such a characterization would ignore the true nature of the transaction. Thus, the Ninth Circuit held that the type of contract entered into by the parties was a contract that only a sovereign could make. Even though private citizens could enter into "license agreements" to sell monkeys, the contract nevertheless concerned Bangladesh's government function — the rights to regulate exports and natural resources. The Ninth Circuit therefore held that "a private party could not have made such an agreement" and concluded that the commercial activity exception did not apply. *Id.*

In this case, unlike the court in *MOL*, the Eleventh Circuit (as well as the district court) did not focus on the claimed breaches but instead focused on the ancillary aspects of the relationship. After finding that HAR was to furnish "office equipment, manuals, training, personnel, promotional and similar services, and . . . financial help," the court ignored the primary aspect of the relationship, the delegation of authority to inspect and certify airworthiness of aircraft in the name of the Government, and the claimed breach by revocation of that right. In doing so, the Eleventh Circuit categorized the relationship at issue as simply a contract for goods and services. (App. A, *infra*, 11a).

Ironically, the Eleventh Circuit distinguished *MOL* by focusing on Bangladesh's grant and revocation of a license to export natural resources:

> The basis of the suit was not the alleged breach of the government contract for the sale of monkeys, but its revocation of the export license. That was part of the sovereign's right to regulate its exports and was therefore immune. That was not a case in which Bangladesh bargained for goods and services in the market and did not pay for them.

(App. A, *infra*, 13a). This demonstrates the frailty in using the overall analysis test in a contract case that includes both governmental and commercial aspects.

The Eleventh Circuit made this error and created a direct conflict with *MOL* by not focusing on the claimed breaches and the primary nature of the relationship. Instead, the court focused on HAR's claim of damages for nonpayment for goods and services when even HAR admits that, just as in *MOL*, the consuming public and not Honduras would pay for the services

HAR rendered. This case is *not* about HAR suing for nonpayment by aircraft owners for past inspections. Instead, HAR has sued Honduras for revoking their authority to perform future government inspections.

B. The Varying Tests That Distinguish Sovereign From Commercial Activity And Application Of These Tests Are In Conflict Among The Circuits.

In its opinion below, the Eleventh Circuit did not attempt to resolve the conflicts among the circuits, but instead stated that: "[a]ll the cases in this area, however, must turn on their own facts and it is not necessary to reconcile them." (App. A, *infra*, 12a). *Id.* at 662. In fact, only this Court can address and reconcile the conflicts among the circuits. It should fill in the enormous gap left unanswered between *Weltover* — the clearly commercial case — and *Nelson* — the clearly sovereign case.

1. The "Overall Analysis" Test

As explained above, the overall analysis test reviews all of the facts in the case with no particular focus on the act alleged as a wrong or the connected activity. This test only works in those cases that involve purely sovereign or purely commercial activity. Such an amorphous test, however, can not work, at least in a predictable manner, in a mixed element case.

The Eleventh Circuit used this overall analysis test, citing the analysis from *Weltover*, and in doing so reached the opposite result from *MOL* on the very same facts. The court below initially recognized that:

> [a]t the heart of the case . . . plaintiff companies claim these two contracts gave them the right to inspect commercial aircraft for certification in

> Honduras and to charge the aircraft owners a fee for that service.

(App. A, *infra*, 5a).

The court also observed:

> [t]hey merely seek to enforce that contract . . . by inspecting and certifying aircraft airworthiness so that Honduras would be able to register aircraft under its flag.

(App. A, *infra*, 11a).

The court also recognized that a sovereign has sovereign rights over the airspace above its territory and registration of aircraft under the Honduran Flag (App. A, *infra*, 10a-11a). But then, the court never mentions the certification issue again, but rather focused on the goods and services HAR was to provide in connection with inspection and registration of aircraft.

2. The "Central Prescription" Test

The second test — the "central prescription" test — was developed by then-Circuit Judge Ruth Bader Ginsberg of the D.C. Circuit. In *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), the court focuses on the primary terms of the agreement, as opposed to its ancillary or performance-enhancing terms, to determine the essential character of the agreement. If the essential character of the primary terms of the agreement is governmental, then the foreign sovereign is immune from suit. If the essential character is commercial, the sovereign is subject to suit.

In *Practical Concepts*, the plaintiff sued the Government of Bolivia for the termination of a consulting contract for the development of Bolivia's rural areas. The contract also featured some terms — *e.g.*, tax exemptions, expedition of customs and immigration process — that only a sovereign could execute. Using the overall test, the district court focused on the tax exemptions and determined the contract was one only a government could enter. *Id.* at 1548 (citations omitted).

On appeal, the D.C. Circuit analyzed the contract and distinguished between its "central" as opposed to its "incidental" or "auxiliary" terms to determine the "essential character of the agreement." *Id.* at 1549-50. Focusing on the "central prescriptions" of the contract, the D.C. Circuit concluded that the contract clearly fell within the commercial exception to the FSIA in that the central exchange was "plainly for the exchange of money for advice on the development of rural areas" and the governmental obligations "just as plainly, were auxiliary to the basic exchange." *Id.* at 1550 (footnote omitted). This test works if the claim is based on the central prescription, but not if the claim is based on the auxillary terms of the relationship or contract.

3. The "Activity in Question" Test

The third test looks at the "activity in question." Under this test, if the activity in question is governmental then the foreign sovereign is immune in the United States. If the activity in question is commercial, then the sovereign may be sued here, but only on claims that are based on or connected with that activity.

In *Millen Indust. Inc. v. Coordination Council*, 855 F.2d 879 (D.C. Cir. 1988), the district court addressed a mixed contract where the private party brought suit against an instrumentality of the people of Taiwan alleging breach of contract, detrimental reliance (promissory estoppel), misrepresentation and conversion. *Id.* at 881. The district court dismissed the claim because, among other reasons, the promises related to the "uniquely sovereign" acts of import and export. *Id.*

On appeal, the D.C. Circuit addressed the initial issue of jurisdiction under the FSIA and held:

> We now decide that when a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity.

Id. at 885. After citing *MOL*, the court went on to conclude that:

> Thus, to the extent that the causes of action are based on promises, breaches of promises, and other allegedly actionable conduct involving extending duty-free status and/or the benefit of Taiwanese law, these would plainly be sovereign aspects of the transaction over which we lack jurisdiction.

Id. Under *Millen*, to the extent that HAR and Omega Air base their causes of action on the termination of the authority to perform airworthiness inspections and to issue airworthiness certificates, refusing to register aircraft under the Honduran Flag, and advising the FAA of all legally registered Honduran aircraft, they are plainly sovereign aspects of the transaction over which the courts of the United States do not have jurisdiction.[6]

To the extent that HAR attempts to plead around the sovereign acts by averring that Honduras promised that it would

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6. Because the court in *Millen* did find that some of the allegations supporting plaintiff's claims could be viewed as commercial in character, the court remanded for further analysis of the jurisdictional facts. *Id.* at 885, 886 n.7.

not arbitrarily revoke rights to registration on certification and/ or failed to warn of such possibility, these claims fall within the "other allegedly actionable conduct" involving again the sovereign aspects of the transaction. In *Nelson*, this Court warned of such "a semantic ploy" to "recast" sovereign acts into ostensibly commercial duties and held:

> To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Nelson, 507 U.S. at 1480 (addressing a failure to warn claim).

This "activity in question" test was also applied by the Fifth Circuit in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). There, the court addressed claims by several passengers on Dominicana Airlines, an instrumentality of the Dominican government, because employees of Dominicana detained and re-routed passengers at the direction of Dominican immigration officials. The passengers sued on various contract and tort theories. In addressing these mixed claims, the court held:

> The focus of the exception to immunity recognized in § 1605(a)(2) is . . . whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character.

Id. at 1379 (citations omitted). Using this test, the court found Dominicana was immune from suit for the false imprisonment and battery claims arising from forcibly boarding passengers onto the Dominicana aircraft. However, the passengers were allowed to pursue other claims against Dominicana related to

sale and marketing of airline tickets and breach of the contract of carriage because they were plainly commercial activities in the normal course of Dominicana's airline business in the United States. *Id.* at 1379-80.

The Seventh Circuit used the activity in question test in *Week v. Cayman Islands*, 983 F.2d 1074, 1992 WL 372241 (7th Cir. 1991).[7] In *Week*, the court addressed claims arising out of the Cayman Islands' involuntary termination of a corporation and taking of the corporation's land without notice or compensation to the shareholders of the corporation. The court first observed that the "chartering, oversight and regulation of companies are core governmental functions" and that "no private person can engage in such inherently governmental functions." *Week*, 1992 WL 372241, at 3. While plaintiffs argued that the government's sale of the land after the acquisition was an act in which a private party could engage, the basis of their complaint was the government's regulation of the corporation and the subsequent taking of the land after dissolving the corporation. Because these were governmental functions and not commercial activity, the government's actions were immune under the FSIA. *Id.*

III.

THE DECISION BELOW IS ERRONEOUS.

The decision below is erroneous for the reasons described in *MOL* and for failure to apply a test appropriate for a mixed contract case. Under the "central prescription" test and, clearly under the "activity in question" test, Honduras would be immune to suit in the United States and would have to answer

7. Because this is an unpublished opinion, Honduras does not cite *Week* as precedent, but only to show conflict among the circuits regarding the various tests.

for its allegedly wrongful sovereign acts in Honduras. This would entail administrative remedies and/or court relief, the same as provided in the United States for those who deal with our government in a similar manner.

The glaring inadequacies of the overall analysis test, used by the Eleventh Circuit in this case, are clearly revealed by the fact that the court went so far as to hold that the Government of Honduras' official communication to the FAA regarding the registration of its aircraft — the basis for Count III — is an act connected to a commercial activity. Not only is this activity something only a sovereign could do, but it is activity between two governments, acting as governments:

> When two governments deal directly with each other *as governments*, even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace.

Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 168 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 726 (1995). Because no one disputes that an official communication between governments is sovereign (just as no one disputes that performing airworthiness inspections, issuing airworthiness certificates and registering aircraft is sovereign), the Eleventh Circuit clearly erred. Had it used the appropriate test, it would have focused on the alleged wrongful acts and the underlying contract provisions concerning these sovereign functions — the basis for HAR's counts — and found that such activity can only be engaged in by a sovereign nation even though the contract also contained elements that can be characterized as commercial activity.

It is crucial to keep in mind that to characterize the Government's acts herein as sovereign does not deprive HAR from

seeking relief against the Honduran Government. HAR remains free to pursue its administrative remedies and/or file suit in the courts of Honduras. *See* R1-23, Att. 2.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 17, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-4519 & 95-4933

D.C. Docket No. 94-CV-10060

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Plaintiffs-Appellees,

OMEGA AIR S DE RL,

Intervenor-Appellee,

v.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(August 25, 1997)
As Amended November 17, 1997

Appendix A

Before: EDMONDSON, Circuit Judge, and KRAVITCH and WOOD*, Senior Circuit Judges.

WOOD, Jr., Senior Circuit Judge:

At first glance one may wonder how plaintiffs, a Honduran corporation and its subsidiary, a Bahamian corporation, can bring a suit against the defendants Government of Honduras and Director General Chirinos (collectively, "Honduras") in the Southern District of Florida. In fact, that is the issue we must decide in this case. Honduras filed a motion to dismiss, claiming immunity under the Foreign Sovereign Immunities Act ("FSIA") and on other grounds. The district court denied defendants' motion to dismiss and ordered the case to proceed. *Honduras Aircraft Registry v. Gov't of Honduras,* 883 F. Supp. 685 (S.D. Fla. 1995). Honduras appeals.

We have jurisdiction over interlocutory orders denying claims of immunity under the FSIA, *see Aldy v. Valmet Paper Machinery,* 74 F.3d 72, 75 (5th Cir. 1996). Honduras also asks us to exercise our pendent appellate jurisdiction over the other related claims which arise under the act of state doctrine and the doctrine of forum non conveniens. Plaintiffs object to our exercise of pendent jurisdiction over the forum non conveniens issue. Pendent jurisdiction depends on the exercise of this court's discretion and judicial economy considerations. In determining whether to exercise discretionary pendent jurisdiction we do so with caution. *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,* 915 F.2d 1375, 1387, 1389 (5th Cir. 1992).

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix A

FACTUAL BACKGROUND

Because this case comes to us on appeal of the district court's denial of a motion to dismiss, it is appropriate that we construe the complaint in the light most favorable to plaintiffs. We will accept as true the complaint's well pleaded facts, even if disputed, but not its conclusions. *Saudi Arabia v. Nelson,* 507 U.S. 349, 351 (1993); *Hishon v. King & Spalding,* 467 U. S. 69, 73 (1984).

Plaintiff Honduras Aircraft Registry, Ltd., is a Honduran subsidiary corporation, fifty-one percent of which is owned by Hondurans. Plaintiff Honduras Aircraft Registry Bureau, Ltd., a Bahamian parent corporation, owns the remainder. The subsidiary company was incorporated in Honduras in May 1992. Two Miami-based businessmen with airline knowledge, one of whom had Honduran contacts, established these two closely related corporations to facilitate negotiating with Honduran officials the contract at issue in this appeal. In general, plaintiff companies' contract proposal was to upgrade and establish a modern civil aeronautics program for Honduras.

The negotiations resulted in a contract on June 4, 1992 entitled "Convention of Technical Assistance Between the Director General of Civil Aeronautics and the Business Honduras Aircraft Registry, Ltd." This contract was modified and reaffirmed by the parties in a separate agreement on December 16, 1993. Together, the contract and its amendment provided that the Government of Honduras would upgrade and modernize the Honduran civil aeronautics program to comply with international aviation laws, and that the plaintiff companies

would provide goods and services to aid Honduras in achieving this goal.[1]

Specifically, under the June 4, 1992 contract the plaintiff companies agreed to:

> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.[2]

Also under this contract, the plaintiff companies were to provide technical manuals for the different types of aircraft seeking registration, as well as personnel to staff the operation. They further agreed to publicize and promote the Honduran air

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1. Omega Air S de RL is an air carrier intervenor. In its brief, Omega Air generally supports the position of plaintiffs and claims to be a third party beneficiary of the contract in question.

2. The "Inspector" is a name given one of the principal officers of one of the plaintiff companies.

registry in the United States and around the world, to involve Honduran government personnel in educational seminars and to provide for additional training. Plaintiff companies also claim to have drafted the Civil Aeronautics Regulations for Honduras.[3] The parties left the June 4 contract open ended; plaintiff companies were to "provide additional equipment each time the necessity of expansion required."

In addition to reaffirming the June 4 contract, the December 16, 1993 agreement clarified and amplified some aspects of the original contract. The plaintiff companies agreed to provide Honduras with economic assistance in completing aircraft inspections outside Honduras and establishing cooperative relationships with the United States Federal Aviation Administration (FAA), the International Organization of Civil Aeronautics, and the air authorities of other nations. A location change is not in the contract; however, the parties agreed separately that they would move their data base from Miami to Key Largo, Florida, where plaintiff companies hired four employees. At the heart of this case, though, lies the fact that plaintiff companies claim these two contracts gave them the right to inspect commercial aircraft for certification in Honduras and to charge the aircraft owners a fee for that service.

Under the Chicago Convention of the International Civil Aviation Organization (ICAO), to which Honduras and the

3. Plaintiffs in their brief claim the contract states that the Government of Honduras entered into the contract to "generate foreign currency and a substantial income" for Honduras. We do not find that provision in the contract itself, but that language does appear in an affidavit by the president of the Registry attached to the complaint which states the generation of fees was in part why the Government of Honduras entered into the Agreement. This argument is considered later.

United States are both signatories, nations may delegate to private entities the authority to issue Certificates of Airworthiness on behalf of the authorizing government. Those private entities are known as Designated Airworthiness Representatives ("DAR"). In the United States, for example, the FAA authorizes DARs to issue airworthiness certificates and perform maintenance functions on the FAA's behalf. To fulfill the contract at issue here, plaintiff companies recruited DARs in the United States, Kenya, Switzerland, South Africa and the United Kingdom. Plaintiffs also provided the equipment and economic assistance to inspect planes outside Honduras.

In 1994, the leadership of Honduras changed. In August of that year Honduras, without prior notice to plaintiff companies, abrogated the contract. Plaintiff companies then filed this suit against Honduras and individually against Guillermo Chirinos, Director General of Civil Aeronautics of Honduras. The plaintiff companies claim they fully performed under the contract during its existence, but allege that Honduras breached the contract and was unjustly enriched because it did not pay plaintiffs for the goods and services that they had already furnished under the contract. Plaintiffs also allege that Chirinos tortiously interfered with plaintiffs' business relationships by advising third parties that the aircraft already registered by plaintiffs' efforts were not properly registered and that the contract with plaintiffs was unlawful. The plaintiffs claim this interference caused the grounding of a minimum of twenty aircraft that they had previously processed, and they seek damages in excess of one million dollars.

DISCUSSION

We review the denial of appellant's motion to dismiss *de novo* as to the law, *Mutual Assurance Inc. v. United States,*

56 F.3d 1353 (11th Cir. 1995), but we apply the clear error standard to any findings of fact. *Brown v. Velmet-Appelton,* 77 F.3d 860 (5th Cir. 1996).

A. *The FSIA*

The FSIA regulates subject matter jurisdiction and provides the only basis for courts in this country to acquire jurisdiction over a foreign state. It provides that a foreign state is immune from the jurisdiction of the United States unless an FSIA statutory exemption is applicable. 28 U.S.C. §§ 1604, 1605-7 (1994); *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 610-11 (1992). The only statutory exemption to foreign sovereign immunity at issue in this case is the commercial activity exemption at 28 U.S.C. § 1605(a)(2). It provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2). The statute defines a "commercial activity" as:

> [E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). Honduras claims the commercial exemption does not apply because plaintiff companies' causes of action are based upon the sovereign acts, not commercial acts, of Honduras. For sovereign acts the defendants presumptively enjoy immunity. *Nelson*, 507 U.S. 349, 359-60. Therefore, Honduras argues, the district court erred in not dismissing plaintiffs' complaint.

The Supreme Court explained the FSIA statutory definition of commercial activity in *Nelson* when it noted that a state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market." 507 U.S. 349, 360 (quotation marks omitted), *citing Weltover*, 504 U.S. at 614. Honduras argues that the inspection and registration of aircraft are powers peculiar to sovereigns, as private persons cannot grant airworthiness certificates and register aircraft.

We begin by examining the contract in its context. Honduras had the right to proceed the way it did in modernizing and expanding its civil aviation program. Only Honduras could actually admit aircraft to its registry — that is a part of sovereignty upon which others may not encroach. But this case involves more than the exercise of that sovereign right.

Appendix A

Apparently Honduras did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry. Its civil air program needed people with the know-how, ability and the economic resources to establish a data bank, write regulations, train government people, and do and provide the other things needed to register, inspect and certify aircraft. Honduras therefore ventured into the marketplace to find the expertise and resources needed to accomplish those tasks. All of those underlying activities were commercial in nature and of the type negotiable among private parties. After receiving the plaintiff companies' proposal, Honduras first directed that one of the companies be incorporated in Honduras, and it then contracted with the plaintiffs for certain goods, services, and other economic assistance to support its new civil air program. Contracting with the plaintiff companies was, in context, an easy way for Honduras to not only upgrade and expand its civil air program even outside Honduras, but also to derive a profit in the process. By hiring the plaintiffs, Honduras overcame its own economic and expertise deficiencies. Honduras could have stayed out of the marketplace by keeping this project all under the sovereignty umbrella. It could have explored the possibility of hiring plaintiffs and plaintiffs' personnel as government employees. Instead, however, Honduras exercised its business judgment and contracted in the marketplace with non-government companies to do and supply what it needed. Without plaintiff companies' private help Honduras likely would not have had a new aircraft inspection and certification service.

The foregoing discussion serves only to clarify and put in context why and how the parties came to the contract. The FSIA limits what we may consider in determining whether an activity is commercial in character. Only the "nature" of the act, not the

"purpose" or "motivation" for the act, is determinative. For example, in ascertaining whether the FSIA commercial exception applies, it is irrelevant that Honduras may have had a possible profit motive or that Honduras may have intended only to fulfill its unique sovereign objectives. *See Nelson,* 507 U.S. at 359; *Weltover,* 504 U.S. at 614.

Within those limitations, therefore, we must determine whether the FSIA commercial exception applies. It is undisputed that a foreign sovereignty is "absolutely immune" from the jurisdiction of foreign courts for its sovereign and public acts. *See* Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987). A foreign state loses its immunity if it engages in commercial activity, however, because then it is exercising the same powers that a private citizen might exercise. *Weltover,* 504 U.S. at 614. That is, a foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.

The plaintiff companies state that this is exactly what Honduras did — it entered the marketplace to shop for goods and services in connection with setting up the desired new civil aviation program. Honduras disagrees, and argues that it would be impossible for a private person to contract with another private person to establish a government aircraft registry. Private entrepreneurs could not register aircraft under their own "private flag" as Honduras can under the Honduran flag. It is not disputed that sovereign states have sovereign rights not only over their physical territory, but also in the airspace above. We agree that actually registering aircraft under the Honduras flag is an act peculiar to its sovereignty and cannot fall within the FSIA commercial activity exception. Plaintiffs, however, are not contending that the contract gave them the right to register

aircraft, and they are not bringing this lawsuit to obtain that right. Instead, they contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. They merely seek to enforce that contract.

The complicated part about this particular contract, though, is that it involves both commercial rights and Honduras' sovereign right to register aircraft. If possible, we must attempt to determine if these two distinct rights are separable. Honduras cannot plausibly argue that purchasing such things as office equipment, manuals, training, personnel, promotional and similar services, and being supplied even financial help, are exclusively sovereign tasks and that Honduras may thus escape its contractual duty to pay for them. Even the caption of the original June 4 contract, as well as its December 16 amendment, acknowledge that the contract was for "technical assistance." Although its terms are not always as clear and specific as could be wished, the agreement does not give plaintiffs the sovereign right to register aircraft under the Honduran flag. It provides only that plaintiffs would provide the means and do the technical work so that Honduras itself could then register the aircraft in accordance with the contract. Any party, sovereign or not, could contract for those goods and services. When Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program. Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could. The *Weltover* court in making that distinction contrasted a government's regulation of the currency market with a government's contract "to buy army boots or even bullets" for

its army which the court labeled commercial activity. *See Weltover* at 414. That same distinction applies to the present case.

In *Weltover* the Government of Argentina issued government negotiable bonds which were marketed to private parties as part of a government plan to stabilize Argentina's currency. Later, Argentina unilaterally rescheduled the maturity dates of the bonds when it anticipated it would be unable to financially redeem them. That action had an impact on the bondholders elsewhere, including in the United States. *Id.* at 609-10. In determining whether Argentina's action was commercial, the Court did not consider Argentina's reasons or motivation for entering the market. That likely would have immunized the whole transaction as sovereign, because Argentina issued the bonds to try to stabilize the national currency. The Court held, instead, that it mattered only that Argentina entered the market where it could find the bond buyers it needed. *Id.* at 614. That was a commercial, not a sovereign, act because any private person can enter the market. As a result, there was no immunity and the Court allowed the bondholders' suit against Argentina to proceed. *Id.* at 617. The same analysis applies, then, when the certification and registration of airplanes is involved. Honduras engaged in marketplace activity the same as private persons can and its actions are not protected by immunity.

To support its argument in favor of immunity, Honduras cites various cases which hold that a sovereign's acts are immune. All the cases in this area, however, must turn on their own facts and it is not necessary to try to reconcile them. In *MOL, Inc. v. People's Republic of Bangladesh,* 736 F.2d 1326, 1328-29 (9th Cir. 1984), for example, the court held that the granting and then the revocation of a license to export monkeys

was a sovereign act. It was sovereign, the court explains, because it involved regulating the country's export of its natural resources. The basis of the suit was not the alleged breach of the government contract for the sale of monkeys, but its revocation of the export license. That was part of the sovereign's right to regulate its exports and was therefore immune. That was not a case in which Bangladesh bargained for goods and services in the market and did not pay for them.

In Justice White's concurrence in *Nelson* he cites the testimony of a State Department officer who noted that there is no justification in international law for allowing a foreign state which enters the market as a private party to avoid the costs it incurs and shift the "everyday burdens of the marketplace onto the shoulders of private parties." 507 U.S. 349, 366 n.2 (White, J. concurring).[4] There is no justification for Honduras to try to shift to the plaintiffs its ordinary marketplace obligations for the goods and services that plaintiff companies furnished. At a minimum, Honduras would be unjustly enriched as plaintiffs allege in count II of the complaint.

Jurisdiction is properly in the Southern District of Florida. Our observations and holding are only for the purpose of reviewing the denial of the motion to dismiss. We do not intend to prejudge the merits which will have to await trial.

The district court also found that jurisdiction was satisfied under § 1605(a)(2) of the FSIA, based upon an act outside the territory of the United States in connection with commercial

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4. This particular statement from the concurrence is not in conflict with the majority opinion as the case turned on its particular facts.

activity of Honduras which caused a direct effect in the United States. Those effects can be easily seen; as the district court noted, the offices and registry database were to be established and maintained in Florida, computers and other equipment were to be purchased in the United States, plaintiffs had DARs in Florida and had established a network of aircraft inspectors in the United States. 883 F. Supp. 685, 689. The only arguable aspect of the FSIA jurisdiction requirements is the commercial activity exemption, but that we have just passed on. We agree with the district court's findings, and we therefore affirm the district court on the FSIA issue.

B. *Act of State Doctrine*

Honduras seeks in the alternative to have the case dismissed under the act of state doctrine. Under this doctrine, Honduras argues, the courts of the United States should not pass on the validity of Honduras' alleged decision to terminate registration under the Honduran flag of aircraft processed by plaintiff companies. The act of state doctrine limits, for prudential rather than jurisdictional reasons, the courts in this country from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory. *Banco National deCuba v. Sabbatino,* 376 U.S. 398, 401 (1964); *Walter Fuller Aircraft Sales v. Rep. of Philippines,* 965 F.2d 1375, 1387 (5th Cir. 1992). The doctrine is fully discussed in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 408 (1989), where the Court explains that the policies underlying the doctrine are "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign affairs." *Id.* The Ninth Circuit discussed the application of the doctrine in *Liu v. Republic of China,* 892

F.2d 1419 (9th Cir. 1989), and it reiterates that the burden of proving acts of state rests on the party asserting the application of the doctrine. *Id.* at 1432, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 694-95. Accepting jurisdiction of this issue, our standard of review is different from that applied under the FSIA in the denial of the motion to dismiss. More is involved than accepting what the complaint alleges as true. The act of state doctrine does not limit courts' jurisdiction as the FSIA does, but it is flexibly designed to avoid judicial action in sensitive areas. *Liu,* 892 F.2d at 1431.

The district court found Honduras' act of state doctrine argument to be without merit. The court discussed some of the underlying principles of the doctrine, but its reason for finding the doctrine inapplicable appears to be that this case involves a perceived commercial exception to the doctrine as under the FSIA. However, there is no commercial exception to the act of state doctrine as there is under the FSIA. The factors to be considered, as recited in *Kirkpatrick,* may sometimes overlap with the FSIA commercial exception, but a commercial exception alone is not enough. The district court may have been correct in holding the doctrine was no bar to this case, but whatever the result may be it must be reached only after consideration of the pertinent factors.

On this issue, therefore, we must vacate the result reached and remand to the district court for further consideration under the controlling factors mentioned above.

C. *Forum Non Conveniens*

After considering some of the various criteria, the district court determined that the Southern District of Florida was not a

forum non conveniens for this case. *Walter Fuller,* a case which also involves the FSIA and the act of state doctrine, sets forth and discusses the factors to be considered when determining whether a particular forum is a forum non conveniens, including "the threshold question whether there exists an alternative forum." 965 F.2d at 1389. In our judgment the Fifth Circuit wisely concluded that it was "inappropriate to reach out and decide the forum non conveniens issue in a case in which [its] appellate jurisdiction is carefully defined by concerns about enforcing the immunity of foreign sovereigns from litigation." *Id.* at 1390. The issue of forum non conveniens is "not closely related to the considerations involved in reviewing decisions concerning either sovereign immunity or the act of state doctrine." *Id.* at 1389. We agree, and decline at this time to exercise our pendent jurisdiction. The appeal of Honduras with respect to this issue is dismissed without prejudice.

CONCLUSION

The district court's decision as to the application of the FSIA is AFFIRMED, as to the act of state doctrine it is VACATED and REMANDED for further consideration, and the appeal as to forum non conveniens is DISMISSED without prejudice.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 25, 1997

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and Honduras Air Registry Bureau, Limited, a Bahamian Corporation, Plaintiffs-Appellees,

Omega Air S de RL, Intervenor-Appellee,

v.

The GOVERNMENT OF HONDURAS, and Guillermo Chirinos, Director General of Civil Aeronautics of the Republic of Honduras, individually, Defendants-Appellants.

Nos. 95-4519, 95-4933.

United States Court of Appeals,
Eleventh Circuit

August 25, 1997

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and KRAVITCH and WOOD, Jr.*, Senior Circuit Judges.

WOOD, Jr., Senior Circuit Judge:

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

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At first glance one may wonder how plaintiffs, a Honduran corporation and its subsidiary, a Bahamian corporation, can bring a suit against the defendants Government of Honduras and Director General Chirinos (collectively, "Honduras") in the Southern District of Florida. In fact, that is the issue we must decide in this case. Honduras filed a motion to dismiss, claiming immunity under the Foreign Sovereign Immunities Act ("FSIA") and on other grounds. The district court denied defendants' motion to dismiss and ordered the case to proceed. *Honduras Aircraft Registry v. Gov't of Honduras,* 883 F.Supp. 685 (S.D. Fla.1995). Honduras appeals.

We have jurisdiction over interlocutory orders denying claims of immunity under the FSIA, *see Aldy v. Valmet Paper Machinery,* 74 F.3d 72, 75 (5th Cir.1996). Honduras also asks us to exercise our pendent appellate jurisdiction over the other related claims which arise under the act of state doctrine and the doctrine of forum non conveniens. Plaintiffs object to our exercise of pendent jurisdiction over the forum non conveniens issue. Pendent jurisdiction depends on the exercise of this court's discretion and judicial economy considerations. In determining whether to exercise discretionary pendent jurisdiction we do so with caution. *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,* 965 F.2d 1375, 1387, 1389 (5th Cir. 1992).

FACTUAL BACKGROUND

Because this case comes to us on appeal of the district court's denial of a motion to dismiss, it is appropriate that we construe the complaint in the light most favorable to plaintiffs. We will accept as true the complaint's well pleaded facts, even if disputed, but not its conclusions. *Saudi Arabia v. Nelson,* 507 U.S. 349, 351, 113 S.Ct. 1471, 1474, 123 L.Ed.2d 47 (1993); *Hishon v.*

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King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984).

Plaintiff Honduras Aircraft Registry, Ltd., is a Honduran corporation, fifty-one percent of which is owned by Hondurans. Plaintiff Honduras Aircraft Registry Bureau, Ltd., a Bahamian subsidiary corporation, owns the remainder. The parent company was incorporated in Honduras in May 1992. Two Miami-based businessmen with airline knowledge, one of whom had Honduran contacts, established these two closely related corporations to facilitate negotiating with Honduran officials the contract at issue in this appeal. In general, plaintiff companies' contract proposal was to upgrade and establish a modern civil aeronautics program for Honduras.

The negotiations resulted in a contract on June 4, 1992 entitled "Convention of Technical Assistance Between the Director General of Civil Aeronautics and the Business Honduras Aircraft Registry, Ltd." This contract was modified and reaffirmed by the parties in a separate agreement on December 16, 1993. Together, the contract and its amendment provided that the Government of Honduras would upgrade and modernize the Honduran civil aeronautics program to comply with international aviation laws, and that the plaintiff companies would provide goods and services to aid Honduras in achieving this goal.[1]

Specifically, under the June 4, 1992 contract the plaintiff companies agreed to:

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1. Omega Air S de RL is an air carrier intervenor. In its brief, Omega Air generally supports the position of plaintiffs and claims to be a third party beneficiary of the contract in question.

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> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.[2]

Also under this contract, the plaintiff companies were to provide technical manuals for the different types of aircraft seeking registration, as well as personnel to staff the operation. They further agreed to publicize and promote the Honduran air registry in the United States and around the world, to involve Honduran government personnel in educational seminars and to provide for additional training. Plaintiff companies also claim to have drafted the Civil Aeronautics Regulations for Honduras.[3]

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2. The "Inspector" is a name given one of the principal officers of one of the plaintiff companies.

3. Plaintiffs in their brief claim the contract states that the Government of Honduras entered into the contract to "generate foreign currency and a substantial income" for Honduras. We do not find that provision in the contract itself, but that language does appear in an affidavit by the president of the Registry attached to the complaint which states the generation of fees was in part why the Government of Honduras entered into the Agreement. This argument is considered later.

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The parties left the June 4 contract open ended; plaintiff companies were to "provide additional equipment each time the necessity of expansion required."

In addition to reaffirming the June 4 contract, the December 16, 1993 agreement clarified and amplified some aspects of the original contract. The plaintiff companies agreed to provide Honduras with economic assistance in completing aircraft inspections outside Honduras and establishing cooperative relationships with the United States Federal Aviation Administration (FAA), the International Organization of Civil Aeronautics, and the air authorities of other nations. A location change is not in the contract; however, the parties agreed separately that they would move their data base from Miami to Key Largo, Florida, where plaintiff companies hired four employees. At the heart of this case, though, lies the fact that plaintiff companies claim these two contracts gave them the right to inspect commercial aircraft for certification in Honduras and to charge the aircraft owners a fee for that service.

Under the Chicago Convention of the International Civil Aviation Organization (ICAO), to which Honduras and the United States are both signatories, nations may delegate to private entities the authority to issue Certificates of Airworthiness on behalf of the authorizing government. Those private entities are known as Designated Airworthiness Representatives ("DAR"). In the United States, for example, the FAA authorizes DARs to issue airworthiness certificates and perform maintenance functions on the FAA's behalf. To fulfill the contract at issue here, plaintiff companies recruited DARs in the United States, Kenya, Switzerland, South Africa and the United Kingdom. Plaintiffs also provided the equipment and economic assistance to inspect planes outside Honduras.

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In 1994, the leadership of Honduras changed. In August of that year Honduras, without prior notice to plaintiff companies, abrogated the contract. Plaintiff companies then filed this suit against Honduras and individually against Guillermo Chirinos, Director General of Civil Aeronautics of Honduras. The plaintiff companies claim they fully performed under the contract during its existence, but allege that Honduras breached the contract and was unjustly enriched because it did not pay plaintiffs for the goods and services that they had already furnished under the contract. Plaintiffs also allege that Chirinos tortiously interfered with plaintiffs' business relationships by advising third parties that the aircraft already registered by plaintiffs' efforts were not properly registered and that the contract with plaintiffs was unlawful. The plaintiffs claim this interference caused the grounding of a minimum of twenty aircraft that they had previously processed, and they seek damages in excess of one million dollars.

DISCUSSION

We review the denial of appellant's motion to dismiss *de novo* as to the law, *Mutual Assurance Inc. v. United States*, 56 F.3d 1353 (11th Cir. 1995), but we apply the clear error standard to any findings of fact. *Brown v. Valmet-Appleton*, 77 F.3d 860 (5th Cir.1996).

A. *The FSIA*

The FSIA regulates subject matter jurisdiction and provides the only basis for courts in this country to acquire jurisdiction over a foreign state. It provides that a foreign state is immune from the jurisdiction of the United States unless an FSIA statutory exemption is applicable. 28 U.S.C. §§ 1604, 1605-7 (1994); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607,

610-11, 112 S.Ct. 2160, 2163-65, 119 L.Ed.2d 394 (1992). The only statutory exemption to foreign sovereign immunity at issue in this case is the commercial activity exemption at 28 U.S.C. § 1605(a)(2). It provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2). The statute defines a "commercial activity" as:

> [E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). Honduras claims the commercial exemption does not apply because plaintiff companies' causes of action are based upon the sovereign acts, not commercial acts, of Honduras. For sovereign acts the defendants presumptively enjoy immunity. *Nelson*, 507 U.S. 349, 359-60, 113 S.Ct. 1471, 1478-79, 123 L.Ed.2d 47. Therefore,

Honduras argues, the district court erred in not dismissing plaintiffs' complaint.

The Supreme Court explained the FSIA statutory definition of commercial activity in *Nelson* when it noted that a state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market." 507 U.S. 349, 360, 113 S.Ct. 1471, 1479, 123 L.Ed.2d 47 (quotation marks omitted), *citing Weltover,* 504 U.S. at 614, 112 S.Ct. at 2166. Honduras argues that the inspection and registration of aircraft are powers peculiar to sovereigns, as private persons cannot grant airworthiness certificates and register aircraft.

We begin by examining the contract in its context. Honduras had the right to proceed the way it did in modernizing and expanding its civil aviation program. Only Honduras could actually admit aircraft to its registry — that is a part of sovereignty upon which others may not encroach. But this case involves more than the exercise of that sovereign right. Apparently Honduras did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry. Its civil air program needed people with the know-how, ability and the economic resources to establish a data bank, write regulations, train government people, and do and provide the other things needed to register, inspect and certify aircraft. Honduras therefore ventured into the marketplace to find the expertise and resources needed to accomplish those tasks. All of those underlying activities were commercial in nature and of the type negotiable among private parties. After receiving the

plaintiff companies' proposal, Honduras first directed that one of the companies be incorporated in Honduras, and it then contracted with the plaintiffs for certain goods, services, and other economic assistance to support its new civil air program. Contracting with the plaintiff companies was, in context, an easy way for Honduras to not only upgrade and expand its civil air program even outside Honduras, but also to derive a profit in the process. By hiring the plaintiffs, Honduras overcame its own economic and expertise deficiencies. Honduras could have stayed out of the marketplace by keeping this project all under the sovereignty umbrella. It could have explored the possibility of hiring plaintiffs and plaintiffs' personnel as government employees. Instead, however, Honduras exercised its business judgment and contracted in the marketplace with non-government companies to do and supply what it needed. Without plaintiff companies' private help Honduras likely would not have had a new aircraft inspection and certification service.

The foregoing discussion serves only to clarify and put in context why and how the parties came to the contract. The FSIA limits what we may consider in determining whether an activity is commercial in character. Only the "nature" of the act, not the "purpose" or "motivation" for the act, is determinative. For example, in ascertaining whether the FSIA commercial exception applies, it is irrelevant that Honduras may have had a possible profit motive or that Honduras may have intended only to fulfill its unique sovereign objectives. *See Nelson,* 507 U.S. at 359, 113 S.Ct. at 1478-79; *Weltover,* 504 U.S. at 614, 112 S.Ct. at 2166.

Within those limitations, therefore, we must determine whether the FSIA commercial exception applies. It is undisputed

that a foreign sovereignty is "absolutely immune" from the jurisdiction of foreign courts for its sovereign and public acts. *See* Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987). A foreign state loses its immunity if it engages in commercial activity, however, because then it is exercising the same powers that a private citizen might exercise. *Weltover,* 504 U.S. at 614, 112 S.Ct. at 2166. That is, a foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.

The plaintiff companies state that this is exactly what Honduras did — it entered the marketplace to shop for goods and services in connection with setting up the desired new civil aviation program. Honduras disagrees, and argues that it would be impossible for a private person to contract with another private person to establish a government aircraft registry. Private entrepreneurs could not register aircraft under their own "private flag" as Honduras can under the Honduran flag. It is not disputed that sovereign states have sovereign rights not only over their physical territory, but also in the airspace above. We agree that actually registering aircraft under the Honduras flag is an act peculiar to its sovereignty and cannot fall within the FSIA commercial activity exception. Plaintiffs, however, are not contending that the contract gave them the right to register aircraft, and-they are not bringing this lawsuit to obtain that right. Instead, they contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. They merely seek to enforce that contract.

The complicated part about this particular contract, though, is that it involves both commercial rights and Honduras'

sovereign right to register aircraft. If possible, we must attempt to determine if these two distinct rights are separable. Honduras cannot plausibly argue that purchasing such things as office equipment, manuals, training, personnel, promotional and similar services, and being supplied even financial help, are exclusively sovereign tasks and that Honduras may thus escape its contractual duty to pay for them. Even the caption of the original June 4 contract, as well as its December 16 amendment, acknowledge that the contract was for "technical assistance." Although its terms are not always as clear and specific as could be wished, the agreement does not give plaintiffs the sovereign right to register aircraft under the Honduran flag. It provides only that plaintiffs would provide the means and do the technical work so that Honduras itself could then register the aircraft in accordance with the contract. Any party, sovereign or not, could contract for those goods and services. When Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program. Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could. The *Weltover* court in making that distinction contrasted a government's regulation of the currency market with a government's contract "to buy army boots or even bullets" for its army which the court labeled commercial activity. *See Weltover*, 504 U.S. at 614, 112 S.Ct. at 2166. That same distinction applies to the present case.

In *Weltover* the Government of Argentina issued government negotiable bonds which were marketed to private parties as part of a government plan to stabilize Argentina's currency. Later, Argentina unilaterally rescheduled the maturity dates of the bonds when it anticipated it would be unable to financially

redeem them. That action had an impact on the bondholders elsewhere, including in the United States. *Id.* at 609-10, 112 S.Ct. at 2163-64. In determining whether Argentina's action was commercial, the Court did not consider Argentina's reasons or motivation for entering the market. That likely would have immunized the whole transaction as sovereign, because Argentina issued the bonds to try to stabilize the national currency. The Court held, instead, that it mattered only that Argentina entered the market where it could find the bond buyers it needed. *Id.* at 614, 112 S.Ct. at 2166. That was a commercial, not a sovereign, act because any private person can enter the market. As a result, there was no immunity and the Court allowed the bondholders' suit against Argentina to proceed. *Id.* at 617, 112 S.Ct at 2167-68. The same analysis applies, then, when the certification and registration of airplanes is involved. Honduras engaged in marketplace activity the same as private persons can and its actions are not protected by immunity.

To support its argument in favor of immunity, Honduras cites various cases which hold that a sovereign's acts are immune. All the cases in this area, however, must turn on their own facts and it is not necessary to try to reconcile them. In *MOL, Inc. v. People's Republic of Bangladesh,* 736 F.2d 1326, 1328-29 (9th Cir.1984), for example, the court held that the granting and then the revocation of a license to export monkeys was a sovereign act. It was sovereign, the court explains, because it involved regulating the country's export of its natural resources. The basis of the suit was not the alleged breach of the government contract for the sale of monkeys, but its revocation of the export license. That was part of the sovereign's right to regulate its exports and was therefore immune. That was not a case in which Bangladesh bargained for goods and services in the market and did not pay for them.

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In Justice White's dissent in *Nelson* he cites the testimony of a State Department officer who noted that there is no justification in international law for allowing a foreign state which enters the market as a private party to avoid the costs it incurs and shift the "everyday burdens of the marketplace onto the shoulders of private parties." 507 U.S. 349, 366 n.2, 113 S.Ct. 1471, 1482 n.2, 123 L.Ed.2d 47 (White, J. dissenting).[4] There is no justification for Honduras to try to shift to the plaintiffs its ordinary marketplace obligations for the goods and services that plaintiff companies furnished. At a minimum, Honduras would be unjustly enriched as plaintiffs allege in count II of the complaint.

Jurisdiction is properly in the Southern District of Florida. Our observations and holding are only for the purpose of reviewing the denial of the motion to dismiss. We do not intend to prejudge the merits which will have to await trial.

The district court also found that jurisdiction was satisfied under § 1605(a)(2) of the FSIA, based upon an act outside the territory of the United States in connection with commercial activity of Honduras which caused a direct effect in the United States. Those effects can be easily seen; as the district court noted, the offices and registry database were to be established and maintained in Florida, computers and other equipment were to be purchased in the United States, plaintiffs had DARs in Florida and had established a network of aircraft inspectors in the United States. 883 F.Supp. 685, 689. The only arguable aspect of the FSIA jurisdiction requirements is the commercial activity exemption, but that we have just passed on. We agree with the district court's findings, and we therefore affirm the district court on the FSIA issue.

4. This particular statement from the dissent is not in conflict with the majority opinion as the case turned on its particular facts.

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B. *Act of State Doctrine*

Honduras seeks in the alternative to have the case dismissed under the act of state doctrine. Under this doctrine, Honduras argues, the courts of the United States should not pass on the validity of Honduras' alleged decision to terminate registration under the Honduran flag of aircraft processed by plaintiff companies. The act of state doctrine limits, for prudential rather than jurisdictional reasons, the courts in this country from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964); *Walter Fuller Aircraft Sales, Inc. v. Rep. of Philippines,* 965 F.2d 1375, 1387 (5th Cir. 1992). The doctrine is fully discussed in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 408, 110 S.Ct. 701, 706, 107 L.Ed.2d 816 (1989), where the Court explains that the policies underlying the doctrine are "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign affairs." *Id.* The Ninth Circuit discussed the application of the doctrine in *Liu v. Republic of China,* 892 F.2d 1419 (9th Cir. 1989), and it reiterates that the burden of proving acts of state rests on the party asserting the application of the doctrine. *Id.* at 1432, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 694-95, 96 S.Ct. 1854, 1861, 48 L.Ed.2d 301. Accepting jurisdiction of this issue, our standard of review is different from that applied under the FSIA in the denial of the motion to dismiss. More is involved than accepting what the complaint alleges as true. The act of state doctrine does not limit courts' jurisdiction as the FSIA does, but it is flexibly designed to avoid judicial action in sensitive areas. *Liu,* 892 F.2d at 1431.

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The district court found Honduras' act of state doctrine argument to be without merit. The court discussed some of the underlying principles of the doctrine, but its reason for finding the doctrine inapplicable appears to be that this case involves a perceived commercial exception to the doctrine as under the FSIA. However, there is no commercial exception to the act of state doctrine as there is under the FSIA. The factors to be considered, as recited in *Kirkpatrick*, may sometimes overlap with the FSIA commercial exception, but a commercial exception alone is not enough. The district court may have been correct in holding the doctrine was no bar to this case, but whatever the result may be it must be reached only after consideration of the pertinent factors. On this issue, therefore, we must vacate the result reached and remand to the district court for further consideration under the controlling factors mentioned above.

C. *Forum Non Conveniens*

After considering some of the various criteria, the district court determined that the Southern District of Florida was not a forum non conveniens for this case. *Walter Fuller,* a case which also involves the FSIA and the act of state doctrine, sets forth and discusses the factors to be considered when determining whether a particular forum is a forum non conveniens, including "the threshold question whether there exists an alternative forum." 965 F.2d at 1389. In our judgment the Fifth Circuit wisely concluded that it was "inappropriate to reach out and decide the forum non conveniens issue in a case in which [its] appellate jurisdiction is carefully defined by concerns about enforcing the immunity of foreign sovereigns from litigation." *Id.* at 1390. The issue of forum non conveniens is "not closely related to the considerations involved in reviewing decisions

concerning either sovereign immunity or the act of state doctrine." *Id.* at 1389. We agree, and decline at this time to exercise our pendent jurisdiction. The appeal of Honduras with respect to this issue is dismissed without prejudice.

CONCLUSION

The district court's decision as to the application of the FSIA is AFFIRMED, as to the act of state doctrine it is VACATED and REMANDED for further consideration, and the appeal as to forum non conveniens is DISMISSED without prejudice.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4519 and 95-4933

D. C. Docket No. 94-10060-CIV

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation; HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Plaintiffs-Appellees,

OMEGA AIR S DE RL,

Intervenor-Appellee,

versus

THE GOVERNMENT OF HONDURAS; GUILLERMO CHIRINOS, Director, General of Civil Aeronautics of the Republic of Honduras, individually,

Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON, Circuit Judge, and KRAVITCH and WOOD*, Senior Circuit Judges.

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*Honorable Harlington Wood, Jr., Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix C

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in these causes be and the same is hereby AFFIRMED in part and VACATED and REMANDED in part to said District Court; and that the appeal as to forum non conveniens is hereby DISMISSED without prejudice in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

Entered: August 25, 1997
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 11/26/97

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 15, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-10060-CIV-KING

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran corporation, HONDURAS AIR REGISTRY BUREAU, LTD., a Bahamian corporation,

Plaintiffs,

vs.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Defendants.

OMEGA AIR S de RL,

Plaintiff/Intervenor,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran corporation, HONDURAS AIR REGISTRY BUREAU, LTD., a Bahamian corporation, THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Defendants.

Appendix D

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE comes to this Court upon Defendants Government of Honduras and Guillermo Chirinos's Motion to Dismiss Plaintiff Omega's Amended Complaint in Intervention, filed on April 7, 1995. Plaintiff Omega filed a response on April 24, 1995.

I. Factual Background

On or about June 4, 1992, Defendant Government of Honduras entered into a contract with Plaintiffs Honduras Aircraft Registry, Ltd. ("Honduras Aircraft Registry") and Honduras Air Registry Bureau, Ltd. ("Registry Bureau") to set up a system of commercial aircraft registration that would be in compliance with international civil aviation law. The contract was modified and reaffirmed on or about December 16, 1993.

Plaintiff Omega Air S de RL ("Omega") was one of the air carriers that registered aircraft in Honduras pursuant to the system of aircraft registration created by the contract between the Government of Honduras and Plaintiffs Honduras Aircraft Registry and Registry Bureau.

In August 1994, the Government of Honduras invalidated the April 1992 decree. One result of the decree invalidation was the grounding of Omega's aircraft, causing damages to Omega and its clients. Omega brings this suit against the Government of Honduras and Guillermo Chirinos, Director General of Civil Aeronautics of the Republic of Honduras, for breach of contract and tortious interference with advantageous business relations.

Appendix D

II. Legal Standard

A motion to dismiss will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. "[D]ismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5A Wright & Miller, *Federal Practice and Procedure* § 1357; *see also Bradberry v. Pinellas County*, 789 F.2d 1513, 1515 (11th Cir. 1986). For the purpose of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. Analysis

Defendants' Motion to Dismiss Omega's Amended Complaint in Intervention is based on the following grounds: 1) lack of subject matter jurisdiction; 2) the act of state doctrine; 3) lack of personal jurisdiction; 4) *forum non conveniens;* and 5) the failure to state a claim upon which relief can be granted. The Court has reviewed the issues raised and finds, for he reasons set forth below, that Defendants' Motion to Dismiss should be denied.

A. *Subject Matter Jurisdiction*

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA") creates a comprehensive framework for determining whether an American court, state or federal,

may exercise jurisdiction over a foreign state. Under the Act, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the statute's exceptions applies. 28 U.S.C. § 1604. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989). If none of the exceptions set forth in the FSIA applies, the district court lacks both statutory subject matter jurisdiction and personal jurisdiction. 28 U.S.C. § 1330(a), (b); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 489 & n.14 (1983).

Under the "commercial activity" exception to the FSIA, a foreign state is not immune from suit in any case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ." 28 U.S.C. § 1605(a)(2). Section 1603(d) defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act." The court determines the commercial character of an activity "by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (emphasis added).

Construing the FSIA, the Supreme Court has held that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607, 614 (1992). The relevant inquiry is thus "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* (emphasis in original) (citation omitted). Honduras's motivations in

establishing a civil aircraft registry are thus irrelevant to this Court's determination.

The contract at issue in the instant case involves the exchange of goods and services. The Government of Honduras acted as any private actor could in securing goods and services from other private actors. The Court thus finds that Honduras's actions are of the type private parties engage in trade and traffic and are therefore commercial in nature.

Moreover, the Court finds that Honduras's commercial activity "cause[d] a direct effect in the United States." The Supreme Court has held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id.*, at 618. Here, the Amended Complaint in Intervention alleges, *inter alia,* that Defendants' breach of contract forced Omega to ground its Honduran-registered aircraft, causing injury to its business reputation. Because Omega is authorized to and does business in the State of Florida, Honduras's actions had an effect in the United States. This effect was the "immediate consequence" of Defendants' breach of contract. Thus, under the Supreme Court's interpretation of 1605(a)(2), Omega's allegations, which for the purposes of a motion to dismiss are assumed true, support jurisdiction under the FSIA. Accordingly, the Court has subject matter jurisdiction over this action under the FSIA.

B. *Act of State Doctrine*

Defendants contend that the act of state doctrine is applicable in the instant case and precludes this Court from judging the validity of a foreign sovereign's public acts. The Court finds this argument to be without merit.

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Under the act of state doctrine, United States courts generally will refrain from ruling on the validity of a foreign sovereign's acts. *See* Restatement (Third) of Foreign Relations § 443(1). The United States Supreme Court has held that the act of state doctrine reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *see also In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 831 (11th Cir. 1984) ("The act of state doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch.").

However, the doctrine is not without its limitations; it "does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). Exceptions to the doctrine include those acts of state that are purely commercial or for which no foreign policy goal of the Executive Branch is impeded. *Id.* at 403-05; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 707 (1976).

The Complaint alleges that Defendants entered into a contract for the development and maintenance of a comprehensive commercial aircraft registration database and system. Accepting the Complaint's allegations as true and viewing them in the light most favorable to the non-moving party, a contract was executed by the Government of Honduras. This is the type of contract private parties enter into in the course

of commerce. There is "nothing about [the government's action] (except perhaps its purpose) that is not analogous to a private commercial transaction." *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607, 616 (1992). In light of the foregoing, the Court finds that Defendants' governmental action at the heart of Omega's allegations is commercial in nature. Thus the act of state doctrine does not apply.

C. *Personal Jurisdiction*

Defendants also move to dismiss the complaint on the ground that the Court lacks personal jurisdiction over Defendants. However, the Supreme Court has interpreted the FSIA to allow a foreign plaintiff to sue a foreign sovereign in the courts of the United States as long as the substantive requirements of the FSIA are satisfied. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489-91 (1983).

With regard to the constitutional aspects of personal jurisdiction under the FSIA, the Supreme Court has applied the *International Shoe* "minimum contacts" test. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992). The Eleventh Circuit has held that a district court should deny a Rule 12(b)(2) motion to dismiss "if plaintiff alleges sufficient facts to support a reasonable inference that defendant can be subjected to jurisdiction of the court." *Jackam v. Hospital Corp. of America Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff need only establish that the Complaint's factual allegations constitute a prima facie showing of jurisdiction. *See Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

The Complaint contains sufficient allegations to withstand Defendants' motion to dismiss. Specifically, Defendants had

sustained and substantial commercial contacts in the United States on matters directly related to the contract at issue in this case. Accordingly, the Court finds that Omega has established a prima facie case of personal jurisdiction over the Defendants.

D. *Forum Non Conveniens*

Defendants move to dismiss on grounds that the Southern District of Florida is a *forum non conveniens.*

A district court has the power to decline to exercise jurisdiction over an action when an adequate, alternative forum is available. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947). The court must "weigh relative advantages and obstacles to fair trial" in each forum and consider factors of both public and private interest. *Id.* at 508; *see La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

A court gives significant deference to a plaintiff's choice of forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981); *Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 830 (5th Cir. 1986) ("The plaintiff's choice of forum is entitled to great weight in the balancing of factors, and unless the balance strongly favors the defendants, the plaintiff's choice of forum should not be overturned.")

Defendants argue that Honduran courts are an adequate alternative forum for Plaintiff's action because they have jurisdiction over Defendants and because Honduran law permits recovery for breach of contract, unjust enrichment and tortious interference with business relationships.

Additionally, Defendants argue that the private interests of the parties require that the case be litigated in Honduras.

Specifically, Defendants point to the fact that the parties will have to produce documents which were prepared and are maintained in Honduras. This argument, and the other arguments Defendants offer on this point ignore the fact that this Court has already determined that the action brought by Plaintiffs Honduras Aircraft Registry and Registry Bureau against these Defendants will be tried in the Southern District of Florida. *See* Order Denying Defendants' Motion to Dismiss, March 8, 1995, at 11. In light of this prior ruling, it is clear that the Southern District of Florida is the most appropriate forum for Plaintiff Omega's action in intervention.

In sum, the Court finds that an adequate, alternative forum does not exist, and that the balance of private and public factors weighs in favor of this Court exercising jurisdiction.

E. *Failure to State a Claim*

Lastly, Defendants contend that Omega fails to state a claim for breach of contract and tortious interference with advantageous business relations.

With regard to its breach of contract claim, Omega has alleged that Defendants intended the subject Agreement to directly and substantially benefit a limited class of which it was a part; that Defendants breached the Agreement in several material respects; and that Defendants' breach caused Omega damages. Complaint ¶¶ 18-22. Accepting these allegations as true, Omega has stated a cause of action for breach of contract.

Additionally, Omega sufficiently states a claim for tortious interference with advantageous business relations. Under Florida law, a plaintiff must prove the following elements to state a valid tortious interference with advantageous business relations claim:

> (1) the existence of a business relationship under which the plaintiff has legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship.

Georgetown Manor, Inc. v. Ethan Allen, Inc., 991 F.2d 1533, 1541 (11th Cir. 1993).

Omega alleges that Defendants knew of the existence of advantageous business relations between Omega and its customers; that Defendants were unjustified in interfering with those relations; and that Omega suffered damage as a result of Defendants' actions. Complaint ¶¶ 25-27. Taken as true, these allegations are sufficient to state a claim for tortious interference with advantageous business relations.

IV. Conclusion

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendants' Motion to Dismiss be, and the same is hereby, DENIED. Defendants are hereby directed to file an answer within twenty (20) days from the date hereof.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 15th day of June, 1995.

Appendix D

[stamp] JAMES LAWRENCE KING

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

cc: Robert C. Owens, Esq.
Donald A. Blackwell, Esq.
Alvin D. Lodish, Esq.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-10060-CIV-K1NG

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran corporation, HONDURAS AIRCRAFT REGISTRY BUREAU, LIMITED, a Bahamian corporation,

Plaintiffs,

vs.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE comes to this Court upon Defendants' Motion to Dismiss, filed on December 1, 1995. After requesting and receiving two extensions of time, Plaintiffs filed a response on February 3, 1995.

I. Factual Background

On or about June 4, 1992, Defendant Government of Honduras entered into a contract with Plaintiffs Honduras

Appendix E

Aircraft Registry and Honduras Air Registry Bureau to set up a system of commercial aircraft registration that would be in compliance with international civil aviation law. The contract was modified and reaffirmed on or about December 16, 1993. Under the terms of said contract, Plaintiffs were to establish an airworthiness system; draft civil aeronautical regulations; develop an aircraft registry database; provide manuals for registered aircraft; keep and maintain records in Florida of all such registered aircraft; effectuate aircraft inspection outside Honduras; promote aircraft registration in Honduras internationally; and provide technical assistance to Honduras' civil aviation authority. Plaintiffs' consideration was the right to inspect commercial aircraft for certification in Honduras and to charge a fee for such service to the aircraft owners. Defendant Government of Honduras ratified the contract by presidential decree on or about April 23, 1992.

On or about August 11, 1994, Defendants Government of Honduras and Guillermo Chirinos invalidated the April 1992 decree. One result of the decree invalidation was the grounding of aircraft, causing damages to Plaintiffs and its clients. Plaintiffs Honduras Aircraft Registry and Honduras Air Registry Bureau thus bring suit for breach of contract, unjust enrichment and tortious interference with a business relationship.

II. Legal Standard

A motion to dismiss will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. "[D]ismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5A Wright &: Miller, *Federal Practice and Procedure* § 1357; *see also*

Bradberry v. Pinella County, 789 F.2d 1513, 1515 (11th Cir. 1986). For the purpose of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims," *Scheuer v. Rhodes*, 426 U.S. 232, 236 (1974).

III. Analysis

Defendants move to dismiss the complaint under the act of state doctrine, lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), lack of personal jurisdiction over Defendants and *forum non conveniens*. The Court has reviewed the issues raised and finds that for the reasons set forth below, Defendants' Motion to Dismiss should be denied.

A. *Act of State Doctrine*

Defendants contend that the act of state doctrine is applicable in the instant case and precludes this Court from judging the validity of a foreign sovereign's public acts. The Court finds this argument to be without merit.

Under the act of state doctrine, United States courts generally will refrain from ruling on the validity of a foreign sovereign's acts. *See* Restatement (Third) of Foreign Relations § 443(1). The United States Supreme Court has held that the act of state doctrine reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); *see also In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 831 (11th Cir. 1984) ("The act of state doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch.")

However, the doctrine is not without its limitations; it "does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). Exceptions to the doctrine include those acts of state that are purely commercial or for which no foreign policy goal of the Executive Branch is impeded. *Id.* at 403-05; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 707 (1976).

The Complaint alleges that the parties entered into a contract for the development and maintenance of a comprehensive commercial aircraft registration database and system. Accepting the Complaint's allegations as true and viewing them in the light most favorable to the non-moving party, a contract was executed between Plaintiffs and the Republic of Honduras for the provision of technical assistance. Compl. at ¶¶ 8-18. This is the type of contract private parties enter into in the course of commerce. There is "nothing about [the government's action] (except perhaps its purpose) that is not analogous to a private commercial transaction." *Republic of Argentina v. Weltover*, 112 S. Ct. 2160, 2167 (1992). In light of the foregoing, the Court finds that Defendants' governmental action at the heart of Plaintiffs' allegations is commercial in nature. Thus the act of state doctrine does not apply.

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B. *Foreign Sovereign Immunities Act*

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA") creates a comprehensive framework for determining whether an American court, state or federal, may exercise jurisdiction over a foreign state. Under the Act, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of the statute's exceptions applies. 28 U.S.C. § 1604. *See Republic of Argentina v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989). If none of the exceptions set forth in the FSIA applies, the district court lacks both statutory subject-matter jurisdiction and personal jurisdiction. 28 U.S.C. § 1330(a,b); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 & fn.14 (1983).

Under the commercial exception, a foreign state is not immune from suit in any case

> in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

28 U.S.C. § 1605(a)(2). Section 1603(d) defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act." The court determines the commercial character of an activity "by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (emphasis added).

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Construing the FSIA, the Supreme Court has held that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover,* 112 S. Ct. 2160, 2166 (1992). The relevant inquiry is thus "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Id.* (emphasis original) (citation omitted). Honduras' motivations in establishing a civil aircraft registry thus are irrelevant to this Court's determination.

The contract at issue in the instant case involves the exchange of goods and services. The government of Honduras acted as any private actor could in securing goods and services from other private actors. The Court thus finds that Honduras' actions are of the type private parties engage in trade and traffic and are therefore commercial in nature.

Plaintiffs rely on § 1605(a)(2) to establish jurisdiction. The Court's analysis also focuses on whether this action is (1) "based . . . upon an act outside the territory of the United States"; (2) that was taken "in connection with a commercial activity" of Honduras outside the U.S.; and (3) that "cause[d] a direct effect in the United States."[1] Presumably, the parties do not contest that the act in question (nullifying the alleged contract) occurred outside the territory of the United States. The dispute thus centers on whether the nullification was taken "in

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1. Neither party disputes that the Republic of Honduras are "foreign states" within the meaning of the FSIA. *See* 28 U.S.C. § 1603 (definitions used in FSIA).

connection with a commercial activity" of Honduras, and whether it had a "direct effect in the United States." The Supreme Court held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity.' *Id.* at 2168.

Having determined that Honduras' actions in entering the contract with Plaintiffs constitute commercial activity, the Court finds that the nullification of said contract also is "in connection with a commercial activity." The Court also finds that said nullification had a "direct effect in the United States." Specifically, the Complaint alleges, *inter alia,* that the offices and the registry database were to be established and maintained in Monroe County, Florida; that computers and other equipment were to be purchased in the United States under the contract; that Plaintiffs had designated airworthiness representatives in Dade and Broward Counties; and that Plaintiffs had established a network of aircraft inspectors in the United States.

The Complaint further alleges that Defendants' breach of contract caused Plaintiffs to expend substantial sums of money, incur significant costs and charges, suffer injury to their business reputations, and lose substantial income and profits that would have accrued to them in their office in Key Largo, Florida. Compl. at ¶ 32. Under the Supreme Court's interpretation of 1605(a)(2), these allegations, if true, support jurisdiction under the FSIA. The harm alleged follows as an "immediate consequence" of Defendants' activities.

The Court has subject matter jurisdiction over this action under the FSIA.

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C. *Personal Jurisdiction*

Defendants also move to dismiss the complaint on grounds that the Court lacks personal jurisdiction over the Defendants. However, the Supreme Court has interpreted the FSIA to allow a foreign plaintiff to sue a foreign sovereign in the courts of the United States as long as the substantive requirements of the FS1A are satisfied. *Verlinden B. V. v. Central Bank of Nigeria,* 461 U.S. 480, 489-91 (1983).

With regard to the constitutional aspects of personal jurisdiction under the FSIA, the Supreme Court applied the *International Shoe* "minimum contacts" test. *Republic of Argentina v. Weltover,* 112 S. Ct. 2160 (1992). The Eleventh Circuit has held that a district court should deny a Rule 12(b)(2) motion to dismiss "if plaintiff alleges sufficient facts to support a reasonable inference that defendant can be subjected to jurisdiction of the court." *Jackam v. Hospital Corp. of Am. Mideast, Ltd.,* 800 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff need only establish that the Complaint's factual allegations constitute a prima facie showing of jurisdiction. *See Ball v. Metallurgie Hoboken Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir.), *cert. denied,* 498 U.S. 854 (1990).

The Complaint contains sufficient allegations to withstand Defendants' motion to dismiss. Specifically, Honduran officials travelled to the Miami, Florida to meet with American FAA officials; the bulk of contact between Plaintiffs and Defendants occurred in the Southern District of Florida; the contract at issue was negotiated in the Southern District of Florida; Defendants had sustained and substantial commercial contacts with Plaintiffs in the United States on matters directly related to the contract; the contract called for performance in the Southern District of

Florida; Defendants used the mail and telephone systems to communicate with Plaintiffs in Miami, Florida.

The Court finds that Plaintiffs have established a prima facie case of personal jurisdiction over the Defendants.

D. *Forum Non Conveniens*

Defendants move to dismiss on grounds that the Southern District of Florida is a forum non conveniens.

A district court has the power to decline to exercise jurisdiction over an action when an adequate alternative forum is available. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 506-07 (1947). The court must "weigh relative advantages and obstacles to fair trial" in each forum and consider factors of both public and private interest. *Id.* at 508; *see La Seguridad v. Transytur Line,* 707 F.2d 1304, 1307 (11th Cir. 1983).

A court gives significant deference to a plaintiff's choice of forum. *Piper Aircraft v. Reyno,* 454 U.S. 235, 255 (1981); *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.,* 796 F.2d 821, 830 (5th Cir. 1986) ("The plaintiff's choice of forum is entitled to great weight in the balancing of factors, and unless the balance strongly favors the defendants, the plaintiff's choice of forum should not be overturned.")

Defendants argue that Honduran courts are an adequate alternative forum for Plaintiff's action because they have jurisdiction over Defendants and because Honduran law permits recovery for breach of contract, unjust enrichment and tortious interference with business relationships. However, Plaintiffs have pointed to legal obstacles that would deny them redress in

Honduran court, including unfavorable publicity and threatened use of the Honduran criminal process to intimidate Plaintiffs' officers and witnesses. The Court finds that Defendants have failed to meet the burden of showing that the alternative forum is both actual and adequate.

In considering the private interests of litigants, the Supreme Court has directed courts to look at: the relative ease of access to sources of proof; ability to obtain witnesses; possibility of view of premises, if relevant; enforceability of a judgment if obtained; and relative advantages and obstacles to a fair trial. *Gulf Oil,* 330 U.S. at 501. Plaintiffs state that the majority of the relevant documentary evidence is in their Key Largo, Florida office. Plaintiffs' principal witnesses reside in South Florida and all of Plaintiffs' Honduran witnesses have expressed willingness to appear.

The public interest factors bearing on the forum's interest in entertaining the lawsuit include: court congestion generated from controversies unrelated to the forum; the desirability of having localized controversies decided at home; the difficulties associated with conflict-of-laws and applying foreign law. *Id.* at 508-09. The controversy is related to the Southern District of Florida in that Plaintiffs' of rices and the database at issue are established here, airworthiness representatives and aircraft inspectors were appointed in Dade and Broward Counties. The Court already has before it translations of many of the relevant documents at issue in the instant case. Moreover, the "application of foreign law is not itself a reason to apply the doctrine of *forum non conveniens.*" *Walpex Trading v. Yacimientos Petroliferos,* 712 F. Supp. 383, 393 (S.D.N.Y. 1989).

In sum, the Court finds that an adequate, alternative forum does not exist and that the balance of private and public factors weighs in favor of this Court exercising jurisdiction.

IV. Conclusion

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendants' Motion to Dismiss be, and the same is hereby, DENIED. Defendants are hereby directed to file an answer within twenty (20) days from the date hereof.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 8th day of March, 1995.

[stamp] JAMES LAWRENCE KING

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

cc: Robert C. Owens, Esq.
Donald A. Blackwell, Esq.
Alvin D. Lodish, Esq.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 18, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4519 and 95-4933

HONDURAS AIRCRAFT REGISTRY, LTD., A Honduran Corporation, HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Plaintiffs-Appellees,

OMEGA AIR S DE RL,

Intervenor-Appellee,

versus

THE GOVERNMENT OF HONDURAS, GUILLERMO CHIRINOS, Director General of Civil Aeronautics of The Republic of Honduras, individually,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____F.2d____).

Appendix F

Before: EDMONDSON, Circuit Judge, and KRAVITCH and WOOD, Jr.,* Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

---

* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX G — RELEVANT STATUTES

28 U.S.C. § 1604 entitled "Immunity of a foreign state from jurisdiction" provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 entitled "General Exceptions to the jurisdictional immunity of a foreign state" provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . .

Appendix G

28 U.S.C. § 1603 entitled "Definitions" provides:

For purposes of this chapter:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(2)

No. 97-1635

Supreme Court, U.S.
FILED
MAY 6 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Respondents.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

OMEGA AIR S de RL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Respondent Omega Air S de RL, pursuant to Rule 29.6, provides the following list of the parent companies and nonwholly owned subsidiaries of Omega Air S de RL:

1. Omega Air, Ltd. – a parent company.

Omega Air, Ltd. has no subsidiaries.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Omega Air S de RL ("Omega"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 129 F.3d 543 (11th Cir. 1997).

REPLY TO STATEMENT OF THE CASE

Omega submits the following Reply to Statement of the Case to present to the Court the areas of disagreement with the statement submitted by Petitioners, and to supply important information that has been omitted.

In a blatantly obvious effort to color the proceedings below, Petitioners have presented the Statement of the Case in a biased and argumentative fashion. For instance, Petitioners continually label the agreed-upon duties of Respondents Honduras Aircraft Registry, Ltd. and Honduras Air Registry Bureau, Limited (collectively "HAR") under the relevant contract as a "government function". Conspicuously absent from Petitioners' Statement of the Case, however, is a recitation of the terms of that contract which give rise to this case. Labels notwithstanding, it is the terms of the contract, and the finding of the Eleventh Circuit that the contract was for the sale of goods and services, which is relevant.

As recited by the Eleventh Circuit, in return for the consideration of charging a fee to the aircraft owners, HAR agreed to inspect commercial aircraft for certification in Honduras, a function which nations can, and

often, delegate to private entities pursuant to the Chicago Convention of the International Civil Aviation Organization. HAR agreed to provide Petitioner, the Government of Honduras ("Honduras"), with economic assistance in completing aircraft inspections outside Honduras and establishing cooperative relationships with the United States Federal Aviation Administration (FAA), the International Organization of Civil Aeronautics, and the air authorities of other nations. In particular, the parties contracted to:

> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.

It is the breach of this contract, and Petitioners' concomitant conduct which gave rise to Omega's damages. Because this case arises from a motion to dismiss Omega's Amended Complaint, the factual allegations of the Amended Complaint are assumed to be true. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

The contract, titled "Contract of Technical Assistance" ("Agreement"), was entered into between HAR and Honduras on June 4, 1992, and later modified on December 16, 1993. (R1-1-4)[1]. The express purpose of the Agreement was to encourage international air carriers, like Omega, to register their aircraft in Honduras and to create an entity based in the United States to facilitate those registrations, perform related inspections and document the carriers' compliance with the requirements of various international aviation authorities. (R1-1-14).

In furtherance of those objectives, HAR published brochures and paid for advertisements in various industry publications, all of which were intended to induce, and in fact did induce, air carriers to have their aircraft inspected by HAR and register their aircraft in Honduras. (SR1-35-3).

Omega utilized HAR's services for five of its aircraft and subsequently registered those aircraft in Honduras. (SR1-35-4). In doing so, Omega relied upon the viability of the Agreement. (SR1-35-4). Thereafter, Omega operated its Honduran registered aircraft in full compliance with the regulations of Honduras and all of its applicable regulatory agencies. (SR1-35-4).

Subsequently, Petitioner Guillermo Chirinos, the Director General of Civil Aeronautics of Honduras, advised the FAA that the Decree which ratified the Agreement was invalid or had been revoked. (SR1-35-4).

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[1] The record references are to the record before the Eleventh Circuit, and represent the volume number-document number-page number.

That action of Petitioners caused the grounding of Omega's Honduran registered aircraft, leaving thousands of passengers stranded, resulted in millions of dollars of lost revenues and profits, and caused irreparable injury to Omega's business reputation. (SR1-35-4).

Omega was permitted to intervene in the action filed by HAR, and alleged in its Amended Complaint that it was a third party beneficiary to the Agreement. (SR1-35-5) Omega further alleged that Petitioners had breached the Agreement by (1) failing to disclose that Omega's aircraft could not be properly registered by utilizing HAR's facilities, (2) wrongfully cancelling the authority of HAR to facilitate the proper registry of aircraft in Honduras, and (3) thereby causing the grounding of Omega's aircraft. (SR1-35-5).

Omega further stated a cause of action for tortious interference with advantageous business relations alleging that Petitioners knew Omega was using its aircraft to accommodate passengers and customers, and knew that their actions would ground the aircraft thereby disrupting the business relations between Omega and its customers. (SR-1-35-6).

Omega further sought injunctive relief compelling Petitioners to issue valid Certificates of Airworthiness on its five aircraft so as to allow Omega to re-register them in another country, and return them to service. (SR1-35-8).

Petitioners moved to dismiss Omega's Amended Complaint, arguing among other points that they were

immune pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605. That motion was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

The sole Question Presented by Petitioners is whether the FSIA, 28 U.S.C. § 1605(a)(2), immunizes a foreign government for claims based on "sovereign acts", when those sovereign acts are "connected" with commercial activities. The Eleventh Circuit, however, did not decide that question in this proceeding. Moreover, the facts of record do not support a determination of that question by this Court.

Contrary to the Question Presented by Petitioners, the Eleventh Circuit made a specific finding that the acts complained of by Respondents were not in any manner sovereign, but rather commercial. As the court stated:

> [Respondents] contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. [Respondents] merely seek to enforce that contract.
>
> * * *
>
> When Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program.

> Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could.

The Eleventh Circuit clearly determined that Petitioners had engaged in commercial, not sovereign activity. Moreover, the facts of record, as determined by the district court and recited by the Eleventh Circuit, do not permit the formulation of Petitioners' Question Presented which is founded on the false premise that Respondents' claims are based on a sovereign act. As the Eleventh Circuit recited, under the Agreement HAR agreed to provide the necessary equipment and assistance in developing a program for the inspection of aircraft that will be under Honduran registry.

In return for providing the technical assistance, HAR was entitled to charge the aircraft owners a fee. There is no finding by the Eleventh Circuit, or fact in the record, from which the Question Presented can be derived. The Question Presented cannot be extracted from the opinion below.

2. Absent A Ruling From The Eleventh Circuit That Any Of The Complained Of Conduct Of Petitioners Was Sovereign, There Is No Reason To Grant The Petition.

As has been demonstrated above, the Eleventh Circuit did not rule that sovereign activity of Petitioners is

not immune under the FSIA. Rather the court held, as has every other court to address the issue, including this Court, that the commercial activity of a sovereign is not immune under the FSIA. Accordingly, the decision of the Eleventh Circuit does not qualify for review.

The FSIA was enacted to "restrict" immunity of foreign states to public acts. *Republic of Argentina v. Weltover*, 504 U.S. 607, 612 (1992); H. R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in*, 1976 U.S. Code Cong. & Admin. News 6604, 6605. When a foreign state chooses to engage in commercial activity and subject itself to the world marketplace, Congress has specifically provided that the foreign state may be liable for the consequences of its conduct. 28 U.S.C. § 1605(a)(2). The purpose of the FSIA is to have "all participants in the marketplace of the world to be treated as equals, and to ascribe to the principles of trade which found their birth in the law-merchant, centuries ago." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). In short, "[o]nce a sovereign enters the marketplace as a commercial actor, it should be subject to all the rules of the marketplace." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 151 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

It is for the courts to determine on a case-by-case basis the distinction between "commercial" and "governmental" activity. *Rush-Presbyterian – St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 577 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989). Congress, however, has provided the courts with specific guidelines. The drafters of the FSIA clearly intended that contracts for the sale of goods and services entered into by foreign states are

presumptively commercial activity. As stated by Bruno Ristau, Chief of the Foreign Litigation Section of the Department of Justice:

> [If] a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract machinery. It bargains and negotiates. It accepts an offer. It enters into a written contract and the contract is to be performed.

Hearings on H.R. Rep. No. 11315 Before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, 94th Cong. 2d Sess. 51 (1976). The breach of a sales contract or any "business tort" associated with it is deemed to be commercial activity. H. R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in*, 1976 U.S. Code Cong. & Admin. News 6604, 6615-16.

Moreover, the *reason* that the foreign state entered into the contract is irrelevant. It is the nature of the contract which determines whether the contract constitutes "commercial" or "governmental" activity. 28 U.S.C. § 1603(d). *See also, Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). If the challenged activity is the type which private persons ordinarily perform, the activity is commercial and not immune under the FSIA. *Weltover*, 504 U.S. at 614. To hold otherwise would vitiate the "restrictive" nature of the FSIA since every contract by a sovereign state is to some extent for a public purpose. *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985).

Contrary to Petitioners' empty claims, the Agreement here concerns only Respondents' ability to engage in commercial activity. The Eleventh Circuit held quite clearly, as a matter of fact, that the contract called for HAR to provide equipment and technical assistance. The Eleventh Circuit held specifically that the contract did not call for HAR to register aircraft. Rather, the contract requires HAR "to provide the means and do the technical work so that Honduras itself could then register the aircraft in accordance with the contract." *Honduras v. Honduras Aircraft Registry, Ltd.*, 129 F.3d 543 (11th Cir. 1997).

Petitioners contend that the Eleventh Circuit's decision is in conflict with *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), and boldly proclaim that the two cases "are identical". *MOL* is completely distinguishable from the instant case. There, a company sued the Republic of Bangladesh for terminating a licensing agreement to export a natural resource of the country – rhesus monkeys. The Ninth Circuit held Bangladesh to be immune under the FSIA because a licensing agreement entered into by a foreign state which regulates its natural resources is an agreement that a private party could not enter into.

The contract in *MOL* actually regulated the state's natural resources – it did not merely facilitate the state's ability to do so itself. Here, the Agreement does not authorize Respondents to register aircraft – a sovereign function. It merely facilitates Honduras's ability to do so itself.

Petitioners argue that the complained of activity is sovereign because it supported the regulation of aircraft registration and airworthiness, which is a government function. This is the same argument which has been consistently rejected by the courts.

For instance, in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Republic of Nigeria repudiated a contract to purchase cement and argued that it was immune under the FSIA because the contract was entered into in support of Nigeria's system of building its infrastructure. The court rejected this argument on the basis that the contract's "purpose – to build roads, army barracks, whatever, is irrelevant." *Texas Trading*, 647 F.2d at 310. The court held Nigeria's conduct to be commercial despite that Nigeria had effected the breach by issuing "sovereign" orders regulating entry into Nigerian ports.

In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985), the Republic of Iran was sued for breaching a contract to buy equipment for armed services. The court held the contract to be commercial – the governmental purpose for the equipment did not change the nature of the activity.

In *Callejo v. Bancomer, S.A.*, 764 F.2d 1102 (5th Cir. 1985), the plaintiffs sued a Mexican national bank for breaching the terms of a certificate of deposit by redeeming the certificate in devalued pesos rather than dollars. The bank claimed immunity under the FSIA because its actions were pursuant to the promulgation of exchange regulations. The court rejected the argument and held that although the promulgation of exchange rates was a

sovereign act, selling and breaching the certificates was commercial activity.

Contrary to Petitioners' assertions, there is no conflict among the circuits. It has been consistently held that commercial activity, even if done for a governmental purpose, is not immune under the FSIA.

Petitioners' further contentions, regarding what it calls the "varying tests" used by the courts, should be given short-shrift. In an attempt to convince this Court that the various Circuits have not consistently ruled on issues concerning the FSIA, Petitioners label three supposed tests applied by the courts to discern what type of activity constitutes commercial activity. Firstly, the courts have not applied different tests. They have simply ruled on the facts on a case-by-case basis.

Moreover, even if one could place a label on the various decisions of the courts and place each into its appropriate pigeon hole (which one cannot do because each case is fact-distinctive), the decade-old and unpublished decisions cited by Petitioners do not demonstrate any lack of uniformity among the courts. All of the cases cited by Petitioners were decided prior to this Court's decisions in *Nelson* and *Weltover*. In those cases this Court explained exactly what type of activity constitutes commercial activity:

> [W]e conclude that when a foreign government acts, not as a regulator of a market, but in a manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature"

> rather than its "purpose", 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 504 U.S. at 614.

> [A] foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market.

Nelson, 507 U.S. at 360.

The rulings of this Court have provided all courts with the guidance that Petitioners now claim is needed. The Eleventh Circuit applied those exact criteria to determine that the activity complained of in the instant case was commercial activity. There is no conflict among the circuits, and the ruling of the Eleventh Circuit was correct.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Respondents.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

OMEGA AIR S de RL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.1.2, respondents, Honduras Aircraft Registry, Ltd. and Honduras Air Registry Bureau, Limited (collectively "HAR"), submit a Statement of the Case as HAR disagrees with Petitioners', the Government of Honduras ("Honduras") and Guillermo Chirinos (collectively "Honduras"), Statement of the Case in the Petition for Writ of Certiorari. Specifically, Honduras presents their Statement of the Case in an argumentative and distorted manner and they omit certain relevant facts while admitting that the facts are assumed as true on an appeal of a motion to dismiss.

The most glaring deficiency in Honduras' Statement of the Case is that it does not provide the terms of the contract sued upon, which are material to the immunity question before the Court. HAR also objects to the numerous references in Honduras' Statement of the Case that the contract at issue delegated "Government function[s]" to HAR by Honduras and that HAR "performed Government function[s]" of inspecting aircraft and issuing airworthiness certificates. The Eleventh Circuit concluded that HAR is not contending that the contract gave them the right to register aircraft (a sovereign act, or government function) and they are not bringing the lawsuit to obtain that right. *Honduras Aircraft Registry v. Government of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997). Instead, HAR contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. *Id.* HAR simply seeks to "enforce that contract." *Id.*

Honduras decided to set up a system of registering commercial aircraft that would be in compliance with international law and treaties; however, it lacked expertise in the field of aeronautics.

R1-1-3.[1] Honduras sought to contract with a company to perform the tasks of hiring and training inspectors, devising a database to register the aircraft, purchasing computer equipment and to perform other necessary tasks needed to establish a system for the registration of commercial aircraft. *Id.* This lawsuit involves the commercial contract entered into between HAR and Honduras. R1-1, at Att. "B" and "C" and R2-43-1. The contract provided for HAR to develop and maintain a commercial aircraft registration database and a system that would upgrade and modernize Honduras' civil air system. R2-43-1, 2; R1-1 at Att. "A". The contract arose out of negotiations with Honduras and Wayne J. Hilmer and Jorge Colindres, who is the President of Honduras Aircraft Registry, Ltd., a Honduran corporation fifty-one percent owned by Hondurans and forty-nine percent owned by Honduras Air Registry Bureau, Ltd., a Bahamian corporation. R2-34-1, 2. R2-34-2. The parties entered into negotiations with Honduran officials regarding Honduras' need to upgrade and modernize its civil aeronautics program and to comply with international aviation laws. R2-34-2. A petition was submitted by HAR to Honduras, providing, in part, that HAR would: 1) provide specialized services in developing the civil aviation authority to enable Honduras to develop an international civil aviation registry in accordance with international regulations; 2) provide for the inspection of aircraft and the issuance of technical aircraft certificates; and 3) promote the Honduran Registry in the United States and around the world. R2-34-2, 3.

On April 23, 1992, Honduras approved and ratified the proposed contract by issuing Accord 000818, a Presidential decree ("Decree"). R2-34-3. The contract was entered into on June 4, 1992 and provided that it was an agreement for "Technical Assistance between the Director General of Civil Aeronautics and Honduras Aircraft Registry Ltd." R1-1 at Att. B.

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[1]The record references are contained in the record on appeal with the Eleventh Circuit Court of Appeals.

The June 4, 1992 contract specifically required HAR to:

> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under the Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.

R1-1 at Att. B. In furtherance of the contract, HAR would conduct aircraft inspections and issue certificates of airworthiness as provided by Honduran and international law. R2-34-3. The contract was modified and reaffirmed by agreement of the parties on December 16, 1993. R2-34-5; R1-1 at Att. "A" and "C".

As required under the contract, HAR provided the necessary equipment and economic assistance to effectuate inspections outside Honduras, maintained all communication equipment mentioned in the contract, employed four people in Key Largo, Florida, and established a computer center at HAR's offices in Key Largo, Florida where HAR hired and paid computer programmers to develop software for the Honduran government. R1-1 at Att. "A"; R2-34-5, 6.

Honduras is a signatory, as is the United States, to The Chicago Convention of the International Civil Aviation Organization ("ICAO"). The ICAO provides that contracting states, such as Honduras, can delegate authority to private entities to issue Certificates of Airworthiness on behalf of the government. R1-31 at

Att. A3 at pp. 18, 20 and 22. These private entities are Designated Airworthiness Representatives ("DARs"). R2-34-3. In the United States, these DARs are authorized by the Federal Aviation Administration ("FAA") to issue Certificates of Airworthiness after an inspection of the aircraft and to perform maintenance functions on behalf of the FAA. R2-34-4. To fulfill the contract at issue, HAR recruited DARs across the United States and in Europe. R2-34-4.

HAR performed inspections of aircraft to be registered by Honduras and collected fees from aircraft owners for the inspection and registration. R2-34-6. The consideration for HAR's investment, collection of fees, technical assistance and international promotion, was the right to inspect commercial aircraft for certification in Honduras and to charge a fee for this service to the owners of the aircraft. R1-1-6.

A change in the Honduran Government occurred in January 1994 and on August 11, 1994 Honduras invalidated the April 1992 Decree, without notice, causing the grounding of aircraft inspected by HAR. HAR filed suit against Honduras claiming that they fully performed under the contract, but Honduras breached the contract and was unjustly enriched because it failed to pay for the goods and services that were previously furnished under the contract. HAR also claimed that Guillermo Chirinos tortiously interfered with HAR's business relationships by communicating to third parties that the commercial and civil aircraft registered through HAR's efforts were not properly registered and that the contract with HAR was unlawful. R1-1-8, 12.

Honduras moved to dismiss the complaint under the Federal Sovereign Immunities Act ("FSIA"), for lack of personal jurisdiction, under the act of state doctrine and for *forum non conveniens*. R1-21. Respondent, Omega Air ("Omega"), intervened as a third party beneficiary of the contract. Omega alleged Honduras breached the contract, and tortiously interfered with advantageous business relations. Honduras also moved to dismiss Omega's complaint. Honduras' motions to dismiss were denied by the district court. The

Eleventh Circuit Court of Appeals agreed and held that based upon the commercial activity exception to the FSIA, Honduras is not immune from suit. The Eleventh Circuit remanded for the district court to apply the correct legal standard to the act of state doctrine and did not consider the *forum non conveniens* argument. *Honduras*, 129 F.3d 543.

REASONS TO DENY THE WRIT

I.
THE QUESTION PRESENTED TO THIS COURT IS NOT SUPPORTED BY THE RECORD AND WAS NOT AN ISSUE BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et. seq.* ("FSIA"), provides the applicable guidelines for subject matter jurisdiction in this case. A foreign state is immune from the jurisdiction of the United States courts unless one of the statutory exceptions exist. 28 U.S.C. §§ 1604, 1605-07; *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The commercial activity exception to foreign sovereign immunity, contained in section 1605(a)(2), provides, in relevant part, that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> ...
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United

> States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C.A. § 1605(a)(2) (West 1994).

Honduras claims that the issue left open by this Court following the recent decisions in *Saudia Arabia v. Nelson*, 507 U.S. 349 (1993) and *Weltover*, 504 U.S. 607, is whether there is immunity for a sovereign act connected to a contract, where the contract contains both sovereign and commercial elements. However, in this case, HAR did not sue Honduras for the right to engage in sovereign acts and the contract at issue does not provide HAR with the right to perform sovereign acts. Instead, the contract provides for HAR's technical assistance in the development and maintenance of a commercial aircraft registration database.

Honduras' claim that HAR was provided the right to register aircraft under the contract is not supported by the record and has been consistently rejected. The Eleventh Circuit Court of Appeal expressly concluded that the contract between Honduras and HAR did not provide HAR with the right to register aircraft and HAR was not suing for that right. *Honduras*, 129 F.3d at 548. More to the point, the acts *sued upon* in this case are not sovereign acts, they are commercial acts. *Id.* In rejecting Honduras' contention that HAR sued Honduras for not performing a sovereign act under the contract, the Eleventh Circuit plainly stated that:

> Honduras ... argues that it would be impossible for a private person to contract with another private person to establish a government aircraft registry. Private entrepreneurs could not register aircraft under their own 'private' flag as Honduras can under the Honduran flag. It is not disputed that sovereign states have sovereign rights not only over their physical territory, but also in the airspace above. We agree

> that actually registering aircraft under the Honduras flag is an act peculiar to its sovereignty and cannot fall within the FSIA commercial activity exception. Plaintiffs, however, are not contending that the contract gave them the right to register aircraft, and they are not bringing this lawsuit to obtain that right. Instead, they contracted to provide goods, and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. They merely seek to enforce that contract.

Id. As the Eleventh Circuit correctly concluded, and as supported by the record in this case, HAR sued Honduras to enforce the right to perform a commercial activity and not to perform a sovereign act. Thus, the acts sued upon are not "mixed" commercial and governmental acts; instead, the basis of HAR's complaint is Honduras' breach of the contract for goods and services. *See Nelson*, 507 U.S. at 357-58 (the court must focus on the particular conduct on which the action is based to determine if the commercial activity exception applies).

In sum, the question presented for review by Honduras (the undecided issue of whether a foreign sovereign is immune from suit where the acts sued upon are sovereign, but are connected to a contract that also has commercial elements) is one that was not before the Eleventh Circuit. Therefore, Honduras' petition for writ for certiorari should be denied.

II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE CONTRACT DOES NOT PROVIDE FOR THE PERFORMANCE OF SOVEREIGN ACTS AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL IN DETERMINING WHETHER A SOVEREIGN IS IMMUNE FROM SUIT IN THE UNITED STATES.

Honduras' claim initially fails as it interprets a mixed commercial and sovereign case to exist when there are no sovereign elements to the contract at issue and HAR has not sued for the performance of sovereign acts. Honduras, similar to its arguments below, has confused the nature of the transaction with its purpose.

A commercial activity within the meaning of the FSIA is determined by reference to the nature of the conduct "rather than by reference to is purpose." *Weltover*, 504 U.S. at 614. A government is not immune from suit in the United States when there is nothing about the government's action (except for its purpose) that is not analogous to a private commercial transaction. *Id.* Likewise, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity as this type of "control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a commercial activity because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15.

Applying these principles to the facts of this case, the registration of aircraft by Honduras is an irrelevant factor to the question of the commercial activity at issue. Instead, "[w]hen Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program. Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could." *Honduras*, 129 F.3d at 548. Thus, this is not a mixed case of sovereign and commercial elements

in the contract sued upon and Honduras' registration of aircraft does not turn this commercial contract into a sovereign activity.

In a further attempt to obtain review by this Court, Honduras has strained the holdings from cases decided prior to this Court's decisions in *Weltover*, 504 U.S. 607, and *Nelson*, 507 U.S. 349. From pre-*Weltover* and *Nelson* decisions out of the Ninth and D.C. circuits, Honduras maintains that three tests exist for determining whether the FSIA applies in "mixed" commercial and sovereign cases: 1) the overall analysis test 2) the central prescription test; and 3) the activity in question test. These tests are either no longer valid, or have been further refined in light of *Weltover* and *Nelson*. Certiorari should not be granted based upon the perceived conflict arising from these purported tests, as identified by Honduras, in light of the holdings in *Weltover* and *Nelson*.

In *Weltover*, this Court held that the Republic of Argentina's default on certain bonds issued as part of an effort to stabilize its currency was an act taken in connection with a commercial activity. 504 U.S. at 617. In reaching this conclusion, the Court held that when a foreign government acts, not as a regulator of the market, but instead acts in the manner of a private player within the market, the sovereign's actions are commercial under the FSIA. *Id.* at 614. It is not the purpose (the reason why the sovereign state engages in the activity); instead, it is the nature (the outward form of the conduct that the foreign state performs or agrees to perform) that is the relevant inquiry in determining whether the commercial activity exception applies. *Id.* at 617. Shortly after the decision in *Weltover*, this Court clarified the focus of the relevant activity for purposes of the commercial activity exception by holding that the proper focus is on the conduct on which the cause of action is based and not on the motivation for the sovereign's acts. *Nelson*, 507 U.S. at 361. These decisions set forth the guiding principles for determining whether the action sued upon falls under the commercial activity exception.

Prior to the decision in *Weltover*, the court in *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1550 (D.C. Cir.

1987), held that it was the essence of the contract sued upon, or the basic exchange, and not the auxiliary features that determined if the relevant activity in question was commercial rather than governmental. Similarly, in *Millen Industries, Inc. v. Coordination Council for North Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988), the court held that when a transaction involves both commercial and sovereign elements, jurisdiction under the FSIA depends on which element the cause of action is based upon. Both of these cases focused on the subject matter of the activity in question.

In contrast to the decisions in *Practical Concepts* and *Millen*, the proper analysis is set forth in this Court's decision in *Weltover*, which emphasizes the form of the transaction in question and not its subject matter. Joan E. Donoghue, *Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale J. of Int'l Law, 489, 509 (1992). Thus, there is no basis for Honduras' claim that there is a conflict among the circuit courts of appeal and that the Eleventh Circuit should have applied the central prescription test, or the activity in question test. Furthermore, the Eleventh Circuit properly applied the precedents in *Weltover* and *Nelson* in considering the nature of the act and the gravamen of the cause of action sued upon, and the court did not rely upon the overall activity of the transaction, as claimed by Honduras. *Honduras*, 129 F.3d at 548.

Another decision relied upon by Honduras for the argument that the circuit courts of appeal are split in their analysis of "mixed" commercial and sovereign activity is *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328-29 (9th Cir. 1984). However, this decision is not at odds with the analysis applied by the Eleventh Circuit in this case. In *MOL*, the Bangladesh Ministry of Agriculture ("Bangladesh") granted MOL a ten year license to capture and export monkeys. MOL sued Bangladesh when it terminated the agreement. The Ninth Circuit held that Bangladesh was immune from suit as the contract concerned Bangladesh's right to regulate its natural resources, which was a uniquely sovereign function, and a private party could not have made such an agreement. *Id.* at 1329. Contrary to Honduras'

contention, the facts in *MOL* are starkly different from the facts in this case.

HAR has not sued Honduras for the right to perform a sovereign function -- instead, HAR has sued to enforce a contract for goods and services. Furthermore, each case must turn on its own facts in determining foreign sovereign immunity. *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F. 2d 1375, 1384 (5th Cir. 1992) ("courts faced with the question whether a particular act or series of acts constitutes commercial activity have ignored the ...[statutory definition of commercial activity] and have consistent with the intent of Congress, defined the concept on an evolving, case-by-case basis") (citing H. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (federal courts are given great latitude in determining what is a commercial activity)). In sum, each case turns on its own set of facts and based upon the vastly different facts in *MOL* as compared to the facts in this case, there is no basis for the assertion that there is a conflict between the Ninth and Eleventh Circuits when determining the commercial activity question under the FSIA.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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